

13

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918

No. 169

POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT,

vs.

CITY OF RICHMOND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

FILED APRIL 7, 1917.

(25,891)

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v.s.

CITY OF RICHMOND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

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c UNITED STATES OF AMERICA, *ss.*:

The President of the United States to City of Richmond, a Municipal Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington on the 3d day of April, 1917, pursuant to an appeal from a decree of the District Court of the United States for the Eastern District of Virginia in your favor passed in a cause in said Court wherein the Postal Telegraph-Cable Company, a corporation, is complainant and you are defendant to show cause, if any there be, why the decree rendered against the said complainant in said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, this 5th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

EDMUND WADDILL, JR.,
United States District Judge.

Service of the above citation is acknowledged by the City of Richmond this 7th day of March, 1917.

H. R. POLLARD,
Solicitor for the City of Richmond.

b [Endorsed:] No. 17. In the District Court of the United States for the Eastern District of Virginia.

Postal Telegraph-Cable Company, Complainant, v. City of Richmond, Defendant. In Equity.

Citation.

Filed March 5th, 1917. Joseph P. Brady, Clerk.

John N. Sebrell, Jr., Attorney and Counsellor at Law, Seaboard Bank Building, Norfolk, Virginia.

UNITED STATES OF AMERICA,

Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia Begun and Held at the United States Court-room in the Post Office Building in the City of Richmond, Virginia, on the First Monday in the Month of October, Being the 2nd Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In Equity, No. 17.

POSTAL TELEGRAPH-CABLE COMPANY, Complainant,

VERSUS

CITY OF RICHMOND, Defendant.

Bill of Complaint.

Filed June 15th, 1915.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

Humbly complaining, shows unto your Honor your complainant, the Postal Telegraph-Cable Company, a corporation, as follows:

First, The complainant, the Postal Telegraph-Cable Company, is a corporation, incorporated under the laws of the State of Delaware, and that it has accepted the provisions of the Act of Congress approved July 24, 1866, and the amendments and supplements thereto, and is operating under the terms of said Act and in accordance with its provisions; that by virtue thereof its poles and wires have been at all times, and are now used for the transmission of telegraph messages for the United States Government and the various departments thereof at prices fixed from time to time by the Postmaster General of the United States in accordance with the terms of said Act of Congress; and that the highways upon which said poles and wires are constructed and operated are postroads and post routes within the meaning of said Act of Congress and the other acts of Congress defining post roads and post routes; that all streets and alleys within the defendant, the City of Richmond, upon which are situated the poles and wires of the said complainant, are postroads under Act of Congress and the Revised

Statutes and the Constitution of the United States, and that your complainant having duly filed its written acceptance with the Postmaster General of the restrictions and obligations of the said Act of Congress, and having fully complied with all the restrictions, obligations, duties and requirements of said Acts of Congress, has the right to construct maintain and operate lines of telegraph over and along all streets and alleys within the defendant, the City of Richmond, in such manner as not to interfere with the ordinary travel thereon, and subject only to such lawful regulations and restrictions as the said City of Richmond might impose in the proper and lawful exercise of the police power.

Second. That the City of Richmond is a municipal corporation, vested with certain delegated powers, the same being the corporate name of a municipality in the Eastern District of the State of Virginia.

Third. That the said complainant is engaged in business as a public service corporation in sending messages by wire throughout the United States, and, by means of connection with cable lines, to all portions of the world; that as such public service telegraph corporation the said complainant maintains an office in the City of Richmond for the purpose of receiving and transmitting messages from the citizens of the City of Richmond and vicinity, to states in the United States other than Virginia, to foreign countries, and to the outside world, and for the purpose of receiving and delivering messages from other states of the United States and from the outside world to the citizens of the City of Richmond and vicinity; that the wires of the complainant telegraph company diverging from the City of Richmond and from the State of Virginia connect with other wires in other states, and telegraph messages are transmitted thereon into and through other states of the United States, and to all of the principal towns and cities therein; and connection is also had with cables under and across the Atlantic Ocean; and the company is engaged in sending and transmitting messages to all of the states of the United States and receiving and delivering messages from all of the states of the United States, and is engaged in interstate commerce, and its said office, wires and poles located in the said City of Richmond are used by it in such interstate commerce.

Fourth. That the Mayor and Council of the City of Richmond, which is the governing body of the said city, by Section 15 A of Chapter 15 of Richmond City Code 1910, a copy of said Section being filed herewith as Exhibit "A" and prayed to be read and taken as a part of this bill, has exacted and does exact of and from your complainant an annual license or privilege tax in the sum of three hundred (\$300.00) dollars, and by Sections 10, 11, 12 and 13 of Chapter 40 of Richmond City Code 1910, has exacted and does exact from your complainant and other telegraphic companies doing business in said City of Richmond, a tax or fee of two (\$2.00) dollars for each pole used, possessed or maintained by the said company and companies located within said city; a copy of said Sections is herewith filed as Exhibit "B" and prayed to be read

- 4 and taken as a part of this bill; that many of the poles thus used, possessed and maintained by complainant are also used, possessed or maintained by other companies, and that each of said companies is required by the said City to pay the tax or fee for each pole so used, possessed or maintained; that the said ordinances in question and each of them are unreasonable, unjust and excessive, and are illegal and void because they, and each of them, are designed and intended to provide revenue from this form of taxation for the general expenses for the City of Richmond, and that no other object than this exists or has at any time existed for the exaction of the large sum of money imposed by the said ordinances and each of them; that the City of Richmond is under no expense whatever in connection with issuing the license required to be taken out by said ordinances and each of them, and has not been at any time heretofore, nor will it be during the years 1914 and 1915 put to any expense or charge whatever in connection with inspecting and regulating the poles, wires or business of this complainant; that the said tax or license fee imposed by the said ordinances and each of them complained of above, is not based on the cost and expense to the city incident to any inspection and supervision and regulation of the complainant's lines and business within the said city, but that it is imposed notwithstanding that it is more than ten times the amount that could be possibly incidental to any such inspection, supervision, and regulation, together with all reasonable measures and precautions that might possibly and could be required to be taken by the said City of Richmond for the safety of its citizens and the public; that the said poles, wires, cables, and other apparatus of complainant are located, as directed by the City of Richmond, on the side of said streets and alleys, and do not interfere with the use of said streets and alleys for highway purposes, and do not interfere with any kind of traffic, and do not interfere with ordinary travel, or with the operation of men or apparatus in extinguishing fires;
- 5 that said lines of telegraph are not old nor decayed, nor worn out, but on the contrary are sound and comparatively new, and are maintained in good repair by said complainant, and that there is no danger of accident from the decay or breaking down of complainant's wires or cables or poles or other apparatus; that the license tax or fee or charge imposed by the said ordinances, and each of them, is grossly excessive, and that if every town or city in the State of Virginia in which the complainant company maintains an office should pass similar ordinances the total amount exacted from the complainant would exceed ten thousand dollars per annum; and if the same kind of ordinances providing for excessive taxes for the towns and cities of all the other states of the United States in which the complainant company maintains offices were adopted, that company could not possibly pay the aggregate amount of such privilege taxes, but would immediately become insolvent by reason of the fact that the expense of operation, including such license fees or taxes would be far in excess of the gross receipts of the complainant company from the whole country at large.

Fifth. That the complainant company is a corporation engaged in legitimate business; that it is engaged in interstate commerce by transmitting telegraphic communications among the several states of this Union; that its poles and wires on, along, over and under the streets of the said City of Richmond are used by it in such interstate commerce; that this is a lawful business, and that the said complainant company pays just and lawful taxes upon the assessed value of its property to the State of Virginia, and to the City of Richmond, and that it is in arrears with respect to none of these taxes; and that the license tax complained of is in addition to all of the other taxes levied by the State of Virginia and the City of Richmond, and is in this respect unfair, unjust, unequal and in direct violation of law. Complainant further shows unto
6 your Honor that while the said license tax purports to be levied only upon business destined from the Richmond office to points within Virginia, and upon business originating within the State of Virginia, and subject to delivery at the Richmond office, that as a matter of fact, in addition to being excessive, and confiscatory, it is violative of the guaranteed constitutional right which inures to and in favor of this company to maintain an office in the City of Richmond for the purpose of engaging in the business of interstate commerce for which it was chartered, and is violative of the right of the complainant company to carry on interstate commerce unhampered and unimpeded; that the right thus involved is a valuable right, worth to complainant many thousand dollars—worth certainly in excess of three thousand dollars; and that if the defendant municipal corporation is allowed to exact the said excessive license fee that it is destructive and will be destructive of the right of this complainant corporation to maintain an office in the City of Richmond for the transaction of the business for which it was chartered, and that in the face of such license exaction in addition to the other taxes imposed by law, it will be impossible for the complainant company to maintain such an office without actual loss.

Sixth. Complainant further shows unto your Honor that by actual arithmetical calculations, taken from the auditor's department, and as a matter of fact, the gross receipts derived by the Postal Telegraph-Cable Company from all of the interstate business done at the City of Richmond in the year 1914, amounted to twenty-one thousand, one hundred and twenty-two and 12/100 (\$21,122.12) dollars; that the total gross receipts derived by the company from the intrastate business done at Richmond amounted to four thousand six hundred and fifteen and 39/100 (\$4,615.39) dollars, or in other words, that seventeen and ninety-three hundredths (17.93) per cent of the receipts from the business of the Richmond office for 1914 was from intrastate business, while the remainder, 83.07% of the receipts, was from interstate business; that the entire expense for 1914 at the Richmond office, not including license fees,
7 nor taxes, nor interest on the investment, nor depreciation, nor over-head expenses, was twenty-two thousand, nine hundred and ninety-eight and 57/100 (\$22,998.57) dollars, and that

the proportionate part of said expense properly chargeable to the intrastate business would be 17.93% thereof, or four thousand, one hundred and sixteen and 64/100 (\$4,116.64) dollars; that the general over-head expense of the complainant, namely, that of superintendence, general management, and corporate expenses, for the year 1914 was \$267,277.61, and that the entire receipts of the complainant for the said period was \$1,153,353.38, or in other words, that the over-head expenses were twenty-three and seventeen hundredths (23.17%) per cent of the receipts, and that, therefore, the proportionate part of the over-head expenses which should be charged to the intrastate business at Richmond is 23.17% of \$4,615.39, or \$1,069.38; that the taxes paid to the State of Virginia for the year 1914 were four hundred and fifty-one and 66/100 (\$451.66) dollars as an ad valorem tax, and fourteen hundred and thirty-five and 56/100 (\$1,435.56) dollars as a State license tax; that the total intrastate business of complainant in Virginia during 1914 was fifteen thousand, seven hundred and seventy-eight and 27/100 (\$15,778.27) dollars, and the total intrastate business done at Richmond was \$4,615.39, or, in other words, 29.23% of the total intrastate business of the company was done at Richmond; that the proper proportion of the expense of the State license tax or \$1,435.56 chargeable to the intrastate business at Richmond, namely, 29.23% thereof, is \$419.61; that the property of the complainant in Richmond is valued at fourteen thousand, two hundred (\$14,200.00) dollars; that experience shows and your complainant here avers that the depreciation of its property will amount at least to ten (10%) per cent per year, and that 10% per year for depreciation will amount to \$1,420.00, of which the proper proportion chargeable to intrastate business would be 17.93% thereof, to-wit: \$254.60. A summary of the above facts would be as follows:

Intrastate receipts	\$4,615.39
Intrastate expense	\$4,116.64
Intrastate overhead expense	1,069.38
Depreciation	254.60
Taxes	419.61
Flat license fee	300.00
Balance	1,544.84
Add pole license fee	632.00
	<hr/> 2,176.84

That the said figures, taken from the auditor's report for the year 1914, are usual and fairly represent the conditions for other years and properly represent as a fact the proportions of expenses and receipts of the said company at its said office in Richmond.

Wherefore the complainant company could not afford, under the facts as just hereinabove set out, to continue to do business in the City of Richmond were it not for the advantage derived therefrom in connection with the business done by it in other and more pop-

ulous parts of the United States where its patrons demand connection with the important towns and cities of the rest of the country, and complainant necessarily maintains its office in the City of Richmond, not for the financial income it receives from its intrastate business at Richmond, but for the purpose of meeting this demand of its patrons in other cities and states throughout the United States and in connection with the operation of its general interstate telegraphic business; and that in operating this office in the City of Richmond for interstate business it is absolutely necessary that it should likewise receive and transmit all messages offered to it which are intrastate in character and addressed to places at which it has offices in the State of Virginia, for under the law, and by express statute of the State of Virginia, it cannot refuse to accept such intrastate business so long as it keeps the Richmond office open and undertakes to maintain it for the purpose of receiving and transmitting telegraphic messages, and as an office of a public service corporation for the conduct of a general interstate telegraphic business; that the maintenance of its office in the City of Rich-

9 mond is necessary to meet the demands and requirements of its interstate business, and that it could not abolish or discontinue the said office without destruction of its general scheme and plan of interstate commerce and competition therein, and without serious and irreparable injury to its said interstate commerce business.

Seventh. Complainant further shows unto your Honor that the City of Richmond does not own the fee in the streets and alleys on which are located the poles of the said company, and that the right of the said City in such streets and alleys is simply an easement of travel for the public generally, and that the said city has no power nor right to charge a rental or occupation tax for the placing of the poles in said streets and alleys; that the laws of the State of Virginia providing for the collection of taxes for the State and its political subdivisions, including the City of Richmond, is exhaustive of the legal right to tax telegraphic companies, and the City of Richmond has no right or power to collect an additional tax of any kind whatsoever from the complainant company, or to receive or collect any tax from it except such as it is entitled to receive under its delegated power to tax property located within the City of Richmond, and that, therefore, said ordinance seeking to collect an occupation tax from this complainant is absolutely void.

Eighth. Complainant further shows unto your Honor that the said tax is discriminatory and denies to the complainant company the equal protection of the law, and for this reason is void and contrary to the provisions of the Constitution of the United States; that the ordinances imposing said tax, though it purports to levy the same against the intrastate business done by the complainant company in the City of Richmond, is in fact a disguised effort to impose a tax against the entire business of the complainant company done
10 in the City of Richmond, including its interstate business, and is therefore an unlawful interference with, and a tax upon the interstate business of the company, and void, be-

cause contrary to the Constitution and laws of the United States relativethereto; that the tax is confiscatory and deprives the complainant of its property without due process of law and is void because contrary to the Constitution and laws of the United States. And complainant further shows unto your Honor that it is impossible to ascertain the exact extent of the injury to which the complainant will be subjected by this interference with its general business and the interruption to and interference with its interstate business, but that the harm and injury to the complainant will be largely in excess of the sum of three thousand dollars.

Ninth. Complainant further shows unto your Honor that the defendant is intending and threatening to attempt to enforce the provisions of the said ordinances, and each of them, complained about, and is intending and threatening to attempt to collect the said tax provided in said ordinances and each of them, and will do so unless restrained therefrom by the proper orders of this Honorable Court; that there is no remedy by which the complainant could recover back monies paid, even though under protest on account of this tax; that the said defendant is threatening to impose upon the complainant the penalties prescribed in said ordinances for the failure to pay the fees mentioned therein and in each of them; that complainant has three hundred and sixteen (316) poles within the City of Richmond, and that the minimum penalty imposed by the ordinance is five (\$5.00) dollars per pole per day, and the maximum penalty is one hundred (\$100.00) dollars per pole per day, and that the city is threatening to impose upon complainant, the penalty of not less than fifteen hundred and eighty (\$1,580.00) dollars nor more than thirty-one thousand, six hundred (\$31,600.00) dollars per day for each day since the 16th day of January, 1915, and

11 by proper officers have notified your complainant that they will insist on the penalty for each day during which the tax is unpaid, and will do so unless restrained and enjoined therefrom by the proper orders of this Honorable Court; that the imposition of such penalties would absolutely confiscate the business and property of the company in this State, and would require complainant to remove from the State and abandon its business here, thereby causing it irremedial injury; that your complainant in the premises is absolutely without adequate remedy at law. Complainant further shows unto your Honor that the value of the business of the complainant company in the City of Richmond which the defendant threatens and is about to attempt to destroy, taken in connection with and related as the City of Richmond is to the other markets of the world, is of a very great value and above the value of the sum of three thousand dollars, exclusive of all interest and cost, and the harm, injury and interruption to which the complainant will be subjected by the attempts and repeated efforts of the defendant to coerce the payment of the said license taxes imposed by said ordinances and each of them, will be of the value of more than three thousand dollars, exclusive of interest and costs.

Tenth. Complainant further shows unto your Honor that the Postal Telegraph-Cable Company is a solvent corporation owning

large property within the State of Virginia, and within the Eastern District of Virginia, and within the jurisdiction of this Honorable Court, and that any recovery had against the said complainant company for any tax or claim enforceable or collectible by law can be collected by due process without due annoyance of delay.

In tender consideration whereof, and inasmuch as your complainant is without remedy save in a court of equity where all such matters are properly cognizable, your complainant prays that the City of Richmond be made a party defendant to this bill and required to appear and answer the same within the time fixed by law and the rules and practice of this Honorable Court, but not under oath, answer under oath being hereby expressly waived; that your Honor will grant and cause to issue a temporary writ of injunction addressed to the City of Richmond, restraining and enjoining the said defendant, the Mayor as chief executive officer thereof, the Chief of Police, the Tax Collector, the License Officer, and all other officers, attorneys, agents, and employees of the said defendant from interfering with the business of the said complainant, or its servants or employees with respect to the collection of the said license or taxes, and commanding and strictly enjoining said defendant and all officers, servants, agents and employees thereof not to demand, coerce, or attempt in any way or manner to enforce the payment of the said taxes or fees imposed by said ordinances or either of them, or from attempting to impose the penalties prescribed therein, until such time as this court may be fully advised and render a final decree herein; and complainant further prays that upon a final hearing of this cause the said temporary injunction may be made in every respect perpetual, thereby forever enjoining and restraining the said defendant, its officers, agents, and employees and all others from attempting to collect the said licenses, fees or taxes, and from attempting to enforce the payment of the same in any manner, or from attempting to impose any penalty for failure to pay said taxes; that your complainant may have all such other, further, general and special relief as the nature of its case may require and to equity and good conscience may seem meet. And your complainant will ever pray.

POSTAL TELEGRAPH-CABLE CO.,

By A. K. AKERS, *Manager & Agent*.

STATE OF VIRGINIA,

City of Richmond, To wit:

I, A. V. Compton, a Notary Public in and for the City of Richmond, in the State of Virginia, do hereby certify that
13 A. K. Akers, Manager & Agent of the said Postal Telegraph-Cable Company, a corporation organized and existing under the laws of the State of Delaware, the complainant in the foregoing bill, personally appeared before me and made oath that the statements contained therein so far as made of his own knowledge are

true, and so far as made upon information derived from others he believes to be true.

Given under my hand this 15th day of June, 1915.

A. V. COMPTON.

Notary Public.

Exhibit "A." Filed with Bill of Complaint.

15. (a).

Express, telegraph and telephone companies having a place of business in the city, for the privilege of doing business within the city of Richmond, but not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents, shall be divided into four classes, and shall pay a license tax for such privilege, if in first class, five hundred dollars; second, four hundred dollars; third three hundred dollars; fourth, two hundred dollars. But nothing in this section shall be construed to affect, impair, or repeal the rights of the city, under section ten of chapter eighty-eight of Richmond City Code of 1899, or under any amendment thereof, requiring telegraph and telephone companies to pay to the city of Richmond annual compensation for the use of its streets, parks, and alleys in the planting of posts therein and stringing wires thereon, or constructing conduits along or under the streets and alleys and running wires therein.

14

Exhibit "B." Filed with Bill of Complaint.

40.

10. As soon as may be after the first day of the fiscal year 1900, and thereafter annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay to the city treasurer a fee of two dollars for each and every telegraph, telephone, and electric light, or other pole used, possessed, or maintained by them respectively, in any of the parks, streets, lanes, or alleys of the city of Richmond, whether such person or corporation be the owner of such pole or not, except trolley poles used exclusively for stringing thereon wires for use in the propulsion by electricity of street railway passenger cars. Upon the receipt of the above fee by the treasurer, the city auditor shall deliver to the person or corporation paying the same a tin plate, with a plain conspicuous number thereon to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter in a book, to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of poles for which it is issued, and the number of the tin plates delivered to the person paying such license fee. He shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specific number of poles, and has received the tin plates of the given number therefor. Such person or corporation then shall have one of such tin plates

securely fastened in some conspicuous place upon each of the poles used, possessed, or maintained by it or him, as may be designated by said superintendent. (May 23, 1900.)

11. It shall be the duty of the city auditor, annually, on or before the fifteenth day of January in each and every year, to purchase a sufficient number of tin plates, numbered with plain, conspicuous figures, beginning with number 1, and so on progressively, to be furnished, as prescribed in the preceding section of this ordinance, to the persons or corporations using, possessing or maintaining, telegraph, telephone, electric light, or other poles other than trolley poles, used exclusively for stringing wires thereon for us in the propulsion, by electricity, of street passenger cars; the City auditor shall cause to be stamped with a proper die or painted on each of such tin plates the year in which they are issued; the said plates to be of suitable size and description, in the discretion of the city auditor. (Code 1899.)

12. After the twentieth day of January, 1896, all telegraph, telephone, electric light and other poles in any of the streets, lanes and alleys of the City of Richmond (except trolley poles used exclusively for stringing thereon wires for use in the propulsion of street passenger cars), which shall not have been included in any list filed in accordance with the ninth section of this chapter, with the city engineer, or upon which the name of the owner is not legibly painted, printed or stamped, or upon which the above mentioned license fee has not been paid, or on which the above prescribed tin plate is not securely fastened in some conspicuous place, shall be forthwith removed by its owner. (Code 1899.)

13. Any person, or persons, or corporation, using, possessing, or maintaining, any telegraph, telephone, electric light, or other poles, in any of the streets, lanes or alleys of the city of Richmond, who shall fail to file with the city engineer the list as prescribed in section nine of this charter, or who shall fail to have stamped, printed or painted in legible characters his or its name as owner upon each of such poles, as prescribed in said section nine, by the twentieth of January of each and every year; or who, if belonging to the classes required to pay a fee of two dollars on each pole by section 16 ten, shall fail to pay the said fee, or shall fail to have the tin plate therein prescribed securely fastened in some conspicuous place by the said twentieth day of January of each and every year, upon all such telegraph, telephone, electric light, or other poles so used, possessed or maintained by him or them, shall be liable to a fine of not less than five nor more than one hundred dollars for each pole upon which he, they or it are so in default; and each day of default to be a separate offence. Such fines to be imposed by the police justice of Richmond. (Code 1899.)

Answer of City of Richmond.

Filed September 22nd, 1915.

This Respondent, for answer to the said bill, or to so much thereof as it is advised it is material for it to answer, answering the several

charges therein made in the order in which the same are made, says:

First, While Respondent admits that complainant is a corporation, incorporated under the laws of the State of Delaware, and that it has accepted the provisions of the Act of Congress, approved July 24, 1866, and the amendments and supplements thereto, and that it is operated under the terms of the said Act and in accordance with the provisions thereof; that by virtue thereof, its poles and wires have been at all times and are now used for the transmission of telegraph messages for the United States Government and the various departments thereof, at prices fixed from time to time by the Postmaster General of the United States, and that the highways upon which said poles and wires are constructed and operated are post roads and post routes within the meaning of the Act of Congress, and that the streets and alleys within the City of Richmond, upon which are situated the said poles and wires of the Complainant, are post roads

under the Act of Congress and the Revised Statutes and the Constitution of the United States and that the complainant has duly filed its written acceptance with the Postmaster General of the restrictions and obligations of said Act of Congress and has complied with all of the restrictions, obligations and requirements of said Act of Congress; yet Respondent does not admit, as alleged by Complainant, that it has the right to construct, maintain and operate lines of telegraph over and along all streets and alleys within the City of Richmond, but on the contrary alleges that the Complainant has only a permissive right to maintain and operate its lines of telegraph over and along said streets and alleys within the City of Richmond under a special contract with the Respondent, which contract and agreement grows out of the acceptance of the provisions of an ordinance of the Council of the City of Richmond approved March 16, 1889, (an official copy of which is herewith filed marked Exhibit R, No. 1, and prayed to be read and considered as a part of this answer); which ordinance was passed in pursuance of the Act of the General Assembly approved February 10, 1880, incorporated in the Code of Virginia 1887 as section 1287, to which reference is hereby made as if the same was fully set out herein. In this connection Respondent says that it is also true that such permissive right to maintain and operate lines of telegraph over and along the streets of the City of Richmond is subject to the express powers granted to the Council of the City of Richmond by virtue of certain provisions of section 19 of the Charter of the City of Richmond, by which it is provided as follows:

"Sec. 19. The Council of the City of Richmond shall have power to enact suitable ordinances to secure and promote the general welfare of the inhabitants of the City, by them deemed proper for the safety, health, peace, good order and morals of the community. * * * ; and no injunction shall be awarded by any court or judge to stay the proceedings of the City of Richmond in the prosecution of its works, authorized to be done under this Charter, unless it be manifest that it, its officers, agents or servants are transcending the authority given it by this Charter, and also that the interposition of

a court of equity is necessary to prevent injury that cannot be adequately compensated in damages."

"19g. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the City, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the City, like authority as over other streets or alleys. They may build bridges in and conduits under said streets, or authorize the construction of conduits, and annex conditions and restrictions to the construction, maintenance and use thereof and they may prevent or remove any structure, obstruction or encroachment over or under or in any street or alley or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its works the streets of the City without the consent of the council. In the meantime, no order shall be made, and no injunction shall be awarded, by any court or judge, to stay the proceedings of the City in the prosecution of their works, unless it be manifest that they, their officers, agents, or servants are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. * * *

"19h. * * * "to prevent injury to or obstruction of the streets, alleys or other public places or property of the City; * * *"

And is also subject to all regulations and restrictions which the City of Richmond may impose in the proper and lawful exercise of the police power, vested in Respondent under the Constitution and laws of the United States and of the State of Virginia

Second, Respondent admits the truth of the allegations contained in the second clause of Complainant's Bill.

Third, Respondent admits the truth of the statements made in the third clause of Complainant's Bill.

Fourth, Respondent admits that the Mayor and Council of the City of Richmond are the governing body of the said city and that by section 15 (a) of Chapter 15, Richmond City Code 1910, a copy of which is filed as Exhibit A with Complainant's Bill, has exacted and does exact of Complainant an annual license tax of \$300.00 "for the privilege of doing business within the City of Richmond, but not including any business done to or from points within the State, and not including any business done for the Government of the United States, its officers or agents," and further admits that by Sections 10, 11, 12 and 13 of Chapter 40, Richmond City Code 1910, Respondent does exact from Complainant and other telegraph companies doing business in the City of Richmond a fee or rental (not a tax) of \$2.00 for each pole used, possessed or maintained by said company and companies located within the city, copies of which said sections are filed as Exhibit B with said Bill; and in this connection Respondent files as Exhibit R, No. 2 a printed copy of said Chapter 40, entitled, "Concerning wires, poles, conduits etc. in, over and under the Streets of the City," which it prays may be read as a part of this answer, as fully and completely as if the same was incorporated herein. And further answering, Respondent says that

it is doubtless true as alleged in said Fourth Clause that many of the poles used by Complainant are also used, possessed and maintained by other companies, and that each of the said companies are required by Complainant to pay the fee or rental of \$2.00 for each pole so used, possessed or maintained; but Respondent utterly denies the allegation made in connection with said statement that said ordinance and each of said sections 10, 11, 12 and 13 are unreasonable, unjust and excessive and are illegal and void, because, as alleged, that they and each of them are designed and intended to derive revenue from this form of taxation for the general expenses of the City of Richmond, and that no other object than this exists or has existed at any time for the exaction of the sums of money imposed by the said ordinance and each of them; Respondent also denies the statement made in said clause that it is under no expense whatever in connection with the supervision, inspection and control of the wires and poles of said company. Respondent likewise denies the allegation in the said fourth clause made concerning the costs and expenses of the inspection and supervision and regulation of complainant's business, concerning the non-interference with traffic and travel upon the streets of the City of Richmond, the operation of men or apparatus in extinguishing fires, the soundness and newness of the Complainant's poles, the absence of danger from accidents from the decay or breaking down of Complainant's wires, cables or poles, concerning the alleged excessive charge made by said
20 ordinances by the City of Richmond and other cities of this Commonwealth, but Respondent knows nothing concerning charges made in other cities of the Commonwealth nor concerning the revenues of Complainant from its business and therefore neither admits nor denies said statements and calls for proof of the same.

In connection with these several denials Respondent says that each and every of the said alleged grievances complained of in the said bill have been the subject of judicial investigation and determination in litigation between Complainant and this Respondent, and therefore further inquiry concerning the same is precluded, the same being *res adjudicata*.

And in order to sustain this defense Respondent says:

(a) That on the 8th day of September 1904, Respondent presented to the Supreme Court of Appeals of Virginia a petition with accompanying exhibits praying the said Court to grant a writ of mandamus commanding the said Complainant "to submit to the Committee on Streets and Shockoe Creek of the Council of the City of Richmond, plans and details showing the location, plan, size, construction and material of the conduits necessary in order to place your (its) wires underground in the streets, alleys and public places of the City of Richmond within the territory mentioned in section 27 of Chapter 88 Richmond City Code 1899 as amended, and also requiring you (it) fully and completely to comply with all of the provisions of section 27 and 28 of said Chapter 88"; to which *answer* the Complainant on December 31, 1904, filed its answer, by which answer said sections 10, 11, 12 and 13 were expressly alleged to be unreasonable and unjust and therefore void, and in addition alleged

that each and every section of Chapter 88 of Richmond City Code 1899, *which* are the same as Richmond City Code 1910, Chapter 40, now alleged to be unconstitutional and void, with the exception of certain amendments made to sections 10, 27 and 28, and with the exception that sections 34, 35, 36, 37, 38, 39 and 40 were added to said Chapter, none of which amendments or additions affect the question here involved except the added section 34, which is in the following language:

"34. None of the obligations, burdens and restrictions of this Chapter shall, in any manner, interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866."

On the issues made by said petition and answer much evidence was taken and the said case came on to be heard before the said Supreme Court of Appeals of Virginia at Richmond on the — day of — 19—, and was fully argued by counsel on both sides and submitted to the court for determination, but before any determination had been made, to-wit, on the 24th day of February, 1906, by consent of parties the said case was dismissed, the said Postal Telegraph-Cable Company having agreed in writing to comply with the provisions of the said Chapter and place its wires underground, all of which will more fully and at large appear by reference to a printed copy of the record of the proceedings in the said Supreme Court of Appeals of Virginia and to a written agreement setting forth the terms on which said case was dismissed, which record and agreement are herewith filed marked Exhibits R. Nos. 3 and 4 and prayed to be read and considered as parts of this answer as fully and completely as if the same were fully set out herein.

And thereupon, in pursuance of said agreement the said Company was promptly informed of the termination of the said litigation and required to place its wires underground within the underground territory, as will appear by a communication addressed to it by Col. W. E. Cutshaw, City Engineer, dated March 21, 1906, a copy of which is herewith filed marked Exhibit R. No. 5 and prayed to be taken and read as a part of this Answer.

Respondent further says that from that time to January 1, 1913, the said Company complied with all of the requirements of Chapter 40 Richmond City Code 1910 concerning the erection and maintenance of its poles, wires and conduits on the streets of the City of Richmond.

(b) That on that date (January 1, 1913) said company refused to comply with the provisions of said Chapter and for that reason was summoned before the Police Justice of the City of Richmond on May 20, 1913, to show cause if any it could why it should not be fined for its failure to pay the fee required by section 10 of Chapter 40 Richmond City Code 1910, on two certain poles located on the streets of the City of Richmond, used but not owned by it, between the 1st and 15th day of January, 1913; and on May 21, 1913, the said Company was fined \$10 for violating the said ordinance, and thereupon took an appeal to the Hustings Court of the City of

Richmond, where the said judgment was affirmed on the 22nd day of October, 1913, from which judgment of the Hustings Court the said Company applied to the Supreme Court of Appeals of Virginia for and obtained a writ of error and supersedeas on January 21, 1914.

That on November 18, 1914, for some reason unknown to Respondent the said writ of error and supersedeas to the said judgment of the Hustings Court of the City of Richmond, pronounced on October 22, 1913, was dismissed on the motion of the complainant at its costs, and the same having been certified to the said Hustings Court, the said Hustings Court on June 26, 1914, entered an order in the words and figures following:

"Friday, June 26th, 1914.

"Present: Hon. D. C. Richardson, Judge.

"CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY, Deft.

"It appearing to the court from a writing filed this day that the said defendant has abandoned its appeal to the Supreme Court of Appeals of Virginia, it is ordered that the Clerk of this court, in lieu of issuing an execution against the said defendant for the fine and costs recovered against it by the City of Richmond, deliver a statement of said fine and costs to the said defendant, or to C. V. Meredith, Esq., its attorney, for payment." (Hustings Court Order Book No. 58, p. 27.)

A statement of which fine and costs amounting to \$31.31 was furnished to the said attorney on August 11, 1914, and on that day said sum was paid by the said attorney into the Treasury of the City of Richmond, all of which will more fully and at large appear by reference to an official copy of the proceedings of the said Hustings Court and of the Supreme Court of Appeals of Virginia, herewith filed marked Exhibit R. No. 6 and prayed to be taken and read as a part of this answer.

Thus leaving, as Respondent is advised, believes and charges, the judgment of the Hustings Court of the City of Richmond in full force and effect, and conclusive of every question now raised and sought to be litigated again in these proceedings.

And Respondent further answering says that all of the points in issue in these proceedings were adjudicated and finally passed upon and determined by litigation between the Western Union Telegraph Company, a corporation engaged in the City of Richmond in precisely the same business as complainant, and the City of Richmond, in the case of Western Union Telegraph Company vs. City of Richmond, decided by the Supreme Court of the United States on April 1, 1912, and reported in 224 U. S. 160, and Re-

pendent further invokes the doctrine of stare decisis as one of its defenses in this case.

Fifth. Respondent admits that the complainant is a corporation engaged in interstate commerce as charged in the Fifth Clause, and that said business is a lawful business when carried on subject to and in pursuance of the Act of the General Assembly of Virginia and the ordinances of the City of Richmond hereinbefore particularly referred to, but denies that the license complained of in said Bill is unfair, unjust, unequal and in direct violation of law, and on the contrary says that the Supreme Court of Appeals of Virginia in the case of Postal Telegraph-Cable Co. v. Norfolk, 101 Va. 125, following the case of Postal Telegraph-Cable Company v. City of Charleston, 153 U. S. 692, had a right to levy the said license tax as it did "for the privilege of doing business within the City of Richmond, but not including any business done to and from points without the State, and not including any business done for the Government of the United States, its officers or agents," as expressly provided by said section 15 (a) of Chapter 15 Richmond City Code 1910. In this connection Respondent says that since February 1906 the said complainant has paid the said license tax for said privilege without objection or protest, and complainant is therefore now estopped by its conduct from claiming that such charge is illegal, and that said sum so charged is onerous and oppressive. The grievance cannot be redressed by appeal to the courts but to the sense of fairness and justice of the law making body of the City of Richmond.

Sixth. For answer to the Sixth Clause of Complainant's Bill Respondent says that the exact question there raised and the alleged state of facts there set forth were brought to the attention of the court in the litigation hereinbefore referred to, and for the reasons hereinbefore stated cannot be again litigated in this court, but Respondent does not admit the truth of the said alleged facts and if the same are to be here litigated calls for proof of the same.

Seventh. While it is true that Respondent does not own the fee in the streets and alleys in which are located the poles of Complainant, and that the right of the Respondent in such streets and alleys is simply an easement of travel for the public generally, yet it is not true that for that reason Respondent has no power or right to charge a rental or occupation tax for the placing of the poles in the said streets and alleys for the obvious reason that the Respondent is charged with the duty of keeping said streets in repair and free from obstruction and is liable in damages for any person injured by reason of its failure to perform that duty as was held by the Supreme Court of the United States in Barnes v. District of Columbia, 91 U. S. 541, and 556; and Respondent further says that as determined in Western Union Telegraph Company v. City of Richmond, supra, it is immaterial to the issues in a case like this whether the title to the fee of the streets and alleys be in the City of Richmond or in the abutting owners.

Eighth. Respondent denies the statement contained in the

Eighth Clause of Complainant's Bill wherein it is alleged that the license tax hereinbefore mentioned "is discriminatory and denies to the complainant company the equal protection of the law, and for this reason is void and contrary to the provisions of the Constitution of the United States," and specially indignantly denies the allegation that said license tax is "a disguised effort to impose a tax against the entire business of the complainant company done in the City of Richmond, including its interstate business," and likewise denies the inferences alleged to be deducible from said alleged facts, viz: that the said tax is "confiscatory and deprives the complainant of its property without due process of law, and is void because contrary to the Constitution of the United States," and in connection with said denial says that if said tax is excessive the redress of the complainant is to the law making power of the City of Richmond, and not to the courts as hereinbefore stated, and especially is this true in this case, as the complainant nowhere states nor can it truthfully state that any such appeal to the Council of the City of Richmond (the law making power of the City of Richmond) has ever been made by it, and without such appeal and denial, if at all, a court of equity cannot take cognizance of the alleged facts even though they be true.

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Ninth. Respondent admits that at the time of the filing of the bill in this case it was seeking by the imposition of a fine to enforce the collection of the dues to the City of Richmond, arising out of the occupation of the streets and alleys of the City with the poles and conduits of the defendant company for the year 1915, and had to that end, on the 24th day of May, 1915, sued out before the Police Justice of the City of Richmond a summons against the defendant company, returnable on the 1st day of June, 1915, requiring it to show cause, if any it could, why a fine of not less than five nor more than one hundred dollars should not be imposed on it for its failure to pay into the City Treasury between the 1st day of January, 1915 and the 15th day of January, 1915, the sum of \$2.00 on each and every of 316 poles used, possessed and maintained by it in the streets and alleys of the City of Richmond during the year 1915, the payment of which is required by sections 19, 11, 12 and 13 of Chapter 40 Richmond City Code 1910, said sum being due the City as compensation for the use of the parks, streets, lanes and alleys of the City of Richmond on which the said Company used, possessed and maintained said poles during the year 1915, and requiring it further to show cause why a further fine should not be imposed for each day's failure to pay said sum since the 16th day of January, 1915, as will fully appear by reference to an official copy of the said summons herewith filed marked Exhibit R, No. 7 and prayed to be taken and read as a part of this answer; and in this connection Respondent further says that after the ending of the litigation between the complainant and Respondent last above mentioned, the plaintiff company paid without objection or protest, the license taxes and other dues for the years 1913 and 1914.

But Respondent denies the allegation in said Ninth Clause that

the object of Respondent is to destroy the business of Complainant, but on the contrary says that the only object that the Respondent has is to secure a compliance with the terms of the said ordinance

27 by the payment of the said compensation, which has been declared by the courts, as hereinbefore stated, to be reasonable and valid in every particular, yet in order to show its entire freedom from any sinister motive in the premises Respondent says that by an ordinance of the Council of the City of Richmond approved July 19, 1915, said section 13 of Chapter 40 Richmond City Code 1910 imposing said penalties was amended, whereby the fine imposed for violating said section is made not less than one nor more than five dollars for each pole in default in the payment of said compensation, each day's default however to be a separate offense, provided, however, that the fines imposed under said section shall not in the aggregate exceed a sum equal to two dollars per pole on the aggregate number of poles used, possessed and maintained by the company in default, all of which will more fully and at large appear by reference to an official copy of the said ordinance herewith filed marked Exhibit R. No. 8 and prayed to be taken and read as a part of this answer.

Tenth. It is no doubt true that the Complainant is a solvent corporation, owning large property within the State of Virginia and within the Eastern District of Virginia and within the jurisdiction of this Honorable Court, and that any recovery had against the said Complainant company for any tax or claim enforceable or collectible at law can be collected by due process without undue annoyance or delay, but Respondent denies that such fact is any justification for its violating an ordinance to which it had given its assent by its original contract between Respondent and Complainant, and which the courts, as hereinbefore set forth, have declared reasonable, constitutional and valid in every particular.

And having fully answered Respondent prays to be hence dismissed with its reasonable costs.

CITY OF RICHMOND,
By GEORGE AINSLIE, *Mayor*.

City Attorney, Solicitor for City of Richmond.

28 CITY OF RICHMOND, *To wit:*

This day George Ainslie, Mayor of the City of Richmond, whose name is signed to the foregoing writing, personally appeared before me, a Notary Public for the said City in the State of Virginia, and made oath before me in my said City that the statements contained in the foregoing answer so far as made on his own information are true, and so far as made on the information of others he believes them to be true.

Given under my hand this 11th day of September, 1915.

RICHMOND T. LACY, JR.

Commission expires Sept. 12, 1916.

Exhibit No. 1, Filed with Answer of City of Richmond.

An Ordinance to allow the Postal Telegraph-Cable Company to Erect Poles and Run Suitable Wires Thereon, in the City of Richmond, Subject to Certain Conditions.

Approved March 16, 1889.

Be it ordained by the Council of the city of Richmond—

1. That, subject to the conditions hereinafter stated, permission is hereby granted to the Postal Telegraph-Cable Company, for the purpose of telegraphic communication, to erect poles and run wires on the streets of said city, on such routes as may be from time to time determined upon and specified by a resolution or resolutions of the Committee on Streets.

2. The quality, character, number, location, condition, appearance, and manner of erection of the poles, wires, and other apparatus needed for the use of said motive power shall be first determined upon and approved by the City Engineer. Whenever at any time the said poles, wires, and other apparatus shall, in the opinion of the City Engineer, need repairing, replacing, being made safe and secure, or being put into proper and suitable condition and appearance, the said company shall immediately proceed to do such repairing, replacing, making safe and secure, or putting into proper and suitable condition and appearance, as the said Engineer shall designate in writing, and all expenses arising therefrom, as to the poles, shall be borne pro rata by all persons or companies then using the same. For any violation of this section, the said company shall be liable to a fine of not less than ten nor more than one hundred dollars; each day's failure to be a separate offence.

3. The permission or permissions herein granted shall be subject at all times to the power hereby reserved by the Council to put other and additional restrictions and regulations upon the erection or use of said poles and wires by said company, and to require at any time, by ordinance or resolution, that the use or erection of said poles and wires shall cease.

4. Whenever any other restriction or regulation, as to the erection or use of said poles and wires, shall be required by the Council, the said company shall immediately proceed, at its own expense, to conform fully thereto; and upon failure so to conform within the time specified by the Council, or, if the Council shall specify no time within which the regulation or restriction shall be done, then with diligence satisfactory to the Committee on Streets, after being notified of such requirement, the said company shall be liable to a fine of not less than ten nor more than one hundred dollars; each day's failure to be a separate offence.

5. Whenever the said company shall be required by the Council to cease using said poles or wires upon any of the streets of the city, the said company shall cease so to use it within such time as may

be designated by the City Council, and shall immediately proceed, at the expiration of such time, to remove from the streets all said poles and wires, and shall restore the streets to the condition in which the remaining portions of said streets shall then be; and upon failure so to remove said obstructions and restore said streets after the expiration of one month after the time designated by the Council, all of said poles, wires, and other apparatus required to be removed, the City Engineer shall, when ordered by the said committee, have the same taken up or removed, and the materials thereof sold, and, after paying all expenses arising therefrom, pay the balance, if any, to said company. For any violation of this section the said company shall be liable to a fine of not less than ten and not more than one hundred dollars; each day's violation to be a separate offence.

6. By the acceptance of the permissions herein granted, the said company hereby agrees to indemnify and save harmless the said city for all loss, costs, or expense to which it may be subjected for any damage or destruction that may be done to or suffered by any one, in his person or property, by reason of the erection or use of said poles or wires.

7. The officials of the Richmond Fire Department and Fire-Alarm and Police Telegraph Department are to have the power to cut any wire of said company whenever deemed necessary for the protection of the city's interests. The said city shall have the right to use, without compensation, any of the poles of said company whenever and in such manner as may be deemed desirable by said city for wires of said city.

8. The Committee on Streets may require the said company to allow other persons or companies to place upon its poles and in such positions any telegraph, telephone, electric light wires, or other wires used for the transmission of electricity, now belonging, or that may hereafter belong, to any person or company, as the said committee may from time to time deem proper; and also to require said other persons or companies to afford such protection as the said committee may deem proper to such wires, when so placed, as will allow said wires to perform the purposes or functions for which they were intended. All such work as to placing of wires now in position is to be done at the cost and expense of said Postal Company. For any failure to perform any requirement ordered under this section, within ten days after being notified of such requirement by the City Engineer, the said company shall be liable to a fine of not less than ten nor more than one hundred dollars; each day's failure to be a separate offence.

This ordinance shall be in force from its passage.

Exhibit No. 2, Filed with Answer of City of Richmond,

Chapter 40.

Concerning Wires, Poles, Conduits, etc., in, over and under, the Streets.

1. Hereafter no poles shall be erected, nor any wire or other apparatus, used in connection with the transmission of electricity, be placed in position, in any street or alley of this city, until the city engineer shall have first determined upon the size, quality, character, number, location, condition, appearance, and manner of erection, of such poles, wires or other apparatus. Whenever at any time the said poles, wires, or other apparatus, shall, in the opinion of the city engineer, need changing in size or location, replacing, repairing, being made safe and secure, or being put in proper and suitable condition and appearance, such one of the persons so using the same (if there be more than one, as shall be selected by the city engineer) shall immediately proceed to do such changing as to size and location, replacing, repairing, making safe and secure, or putting into proper and suitable condition and appearance, as the said engineer shall designate in writing, and all damage done to any street by the erection of any pole shall from time to time be rectified and repaired as required by the city engineer. All expenses arising from any materials furnished or work done under this section, shall be borne in such proportions by all persons using such poles, wires or other apparatus as the city engineer may deem fair; unless the parties can agree upon satisfactory terms within ten days from the time such changes or repairs shall have been completed. (Code 1899.)

2. That all poles now erected in the streets or alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth. (Code 1899.)

3. No pole now erected for the support of telephone wires shall remain on any street in said city after the fifteenth day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such poles or poles and telephone wires supported thereon from the streets, alleys of the city by the twentieth day of December, 1895, and restore the street to a condition similar to the rest of the street or all contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley, to be imposed by the police

justice of the city; each day's failure to be a separate offence. (Code 1899.)

4. The committee on streets may hereafter require any person or company owning any such poles, used for telephone or telegraph purposes, to allow any other person or company to place upon its poles and in such positions thereon any telegraph, telephone, or any other light current wire which may be used for the transmission of electricity now belonging to, or that may hereafter belong to, any person or company authorized by the council to run wires in the streets or alleys, as the committee may from time to time deem proper, and which will not, in the opinion of said committee, unreasonably interfere with the business of the person or company owning such poles, and upon such terms and conditions as may be agreed upon by said owner and any person or company desiring to use such poles; and in the event that said owner and the person or company desiring to use said poles cannot agree upon satisfactory terms and conditions, the same shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said poles, and the third by the two persons so selected; and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said poles. If the said owner shall, for thirty days after having been requested in writing to appoint its representative, fail to make such appointment then the city engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select the third arbitrator, then the city engineer shall select such third arbitrator, and when so selected he shall have the same powers he would have had if he had been appointed by the said two arbitrators. Or, if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the city engineer shall have power to select a person who shall have power to settle and determine said terms and conditions. Should either the said owner, or any person or company that may, under this section, enter upon and use the poles of the said owner, fail to keep and perform each and every one of the terms as to the use of said poles, the company so failing shall be liable to a fine of not less than ten nor more than one hundred dollars for such failure; each day's failure to be a separate offence. The said committee shall have the power to require said owner to allow any person or company desiring to enter upon and use said poles to so enter and use the same, under such conditions as the city engineer may prescribe, as soon as the said person or company so desiring to enter shall have appointed its arbitrator; but the person or company so entering shall do so under contract and bond that he or it will abide by and conform to the terms and conditions

determined upon by the arbitrators, as soon as such decision shall be announced. And the said committee shall have power, also, to require from time to time the said owner, or any other person or company using said poles, to afford and furnish such protection or protections to all wires on such poles as the said committee may deem proper or necessary in order to allow such wires to perform the purposes or functions for which they were intended. All work as to placing of wires now upon the poles of any other company shall be done at the cost and expense of the party desiring to use such poles. Each and every one of the above stated provisions shall respectively apply to poles now carrying electric light, electric power, and electric car wires, to the extent of entitling any person or company, authorized by the council to run wires over the streets and alleys and authorized by said committee in accordance with the terms of this ordinance to place on any such pole any electric light, electric power, electric car wires, or other heavy current wires which may be used for the transmission of electricity. For any failure to perform any requirement ordered under this section within ten days after being notified of such requirement by the city engineer, each party so in default shall be liable to a fine of not less than fifty nor more than five hundred dollars; each day's failure to be a separate offence. (Code 1899.)

5. Hereafter no poles shall be erected until the city engineer shall have first determined upon the size, quality, character, number, location, condition, appearance and manner of erection of such poles. (Code 1899.)

6. Each and every permission herein given is granted under the condition that the city shall have the right by and through the board of fire commissioners to run all wires needed for the fire-alarm and police telegraph department on all poles erected or allowed under this ordinance to remain on any street or alley of the city, and in such positions on said poles as shall seem proper to the superintendent of said department. Whenever any permission has been granted by the council or the street committee to any person or corporation to erect any pole or poles for the support of wires used for the transmission of electricity, it shall be the duty of such person or corporation, before erecting any such pole or poles, to submit to the board of fire commissioners a diagram showing the proposed location of such poles and arrangement of poles and wires, so as to enable said superintendent to elect and require to be reserved such positions on any such pole or poles as he may deem proper and necessary. (Code 1899.)

7. No person or company shall use the poles, wires or other apparatus above referred to of any other person or company until he or it shall have filed with the city engineer a written application fully setting forth what poles or other apparatus he or it shall desire to use, nor until receiving from said engineer a written notification that the said committee has given the applicant permission to so use the same in accordance with the provisions of this ordinance. (Code 1899.)

8. The city council hereby reserves the right to put at any time

other restrictions and regulations as to the erection and use of said poles, wires and other apparatus used in connection with the transmission of electricity, and from time to time require such poles as it may deem proper to be removed, and the wires thereon to be run in conduits upon such terms as the city may deem proper. (Code 1899.)

9. All persons and corporations having, using, or maintaining, any telegraph, telephone, electric light or other poles, in any of the parks, streets, lanes or alleys of the city of Richmond, shall annually, between the fifteenth day of December and the first day of January in each and every year, file with the city engineer a list of all such poles so used, possessed or maintained by him or them, giving the accurate location of each of such poles and of the number and character of wires carried thereon, the names of the owners of said poles and of the persons using the same, and shall at all times keep stamped, painted, or printed thereon, in legible characters, their name as owner upon each of such poles. A copy of such list shall be furnished by said engineer to the city auditor and to the superintendent of fire-alarm and police telegraph. (Code 1899.)

10. As soon as may be after the first day of the fiscal year 1900, and thereafter annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay to the city treasurer a fee of two dollars for each and every telegraph, telephone, electric light, or other pole used, possessed, or maintained by them respectively, in any of the parks, streets, lanes, or alleys of the city of Richmond, whether such person or corporation be the owner of such pole or not, except trolley poles used exclusively for stringing thereon wires for use in the propulsion by electricity of street railway passenger cars. Upon the receipt of the above fee by the treasurer, the city auditor shall deliver to the person or corporation paying the same a tin plate, with a plain conspicuous number thereon, to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter in a book, to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of poles for which it is issued, and the number of the tin plates delivered to the person paying such license fee.

37 He shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specific number of poles, and has received the tin plates of the given numbers therefor. Such person or corporation then shall have one of such tin plates securely fastened in some conspicuous place upon each of the poles used, possessed, or maintained by it or him, as may be designated by said superintendent. (May 23, 1900.)

11. It shall be the duty of the city auditor, annually, on or before the fifteenth day of January in each and every year, to purchase a sufficient number of tin plates, numbered with plain, conspicuous figures, beginning with number one, and so on progressively, to be furnished, as prescribed in the preceding section of this

ordinance, to the persons or corporations using, possessing, or maintaining, telegraph, telephone, electric light, or other poles other than trolley poles, used exclusively for stringing wires thereon for use in the propulsion, by electricity, of street passenger cars; the city auditor shall cause to be stamped with a proper die or painted on each side of such tin plates the year in which they are issued; the said plates to be of suitable size and description, in the discretion of the city auditor. (Code 1899.)

12. After the twentieth day of January, 1896, all telegraph, telephone, electric light and other poles in any of the streets, lanes and alleys of the city of Richmond (except trolley poles used exclusively for stringing thereon wires for use in the propulsion of street passenger cars), which shall not have been included in any list filed in accordance with the ninth section of this chapter, with the city engineer, or upon which the name of the owner is not legibly painted, printed or stamped, or upon which the above-mentioned license fee has not been paid, or on which the above prescribed tin plate is not securely fastened in some conspicuous place, shall be forthwith removed by its owner. (Code 1899.)

13. Any person, or persons, or corporation, using, possessing, or maintaining, any telegraph, telephone, electric light, or other poles, in any of the streets, lanes or alleys of the city of Richmond, who shall fail to file with the city engineer the list as prescribed in section nine of this chapter, or who shall fail to have stamped, printed or painted in legible characters his or its name as owner upon each of such poles, as prescribed in said section nine, by the twentieth of January of each and every year; or who, if belonging to the classes required to pay a fee of two dollars on each pole by section ten, shall fail to pay the said fee, or shall fail to have the tin plate therein prescribed securely fastened in some conspicuous place by the said twentieth day of January of each and every year, upon all such telegraph, telephone, electric light, or other poles so used, possessed or maintained by him or them, shall be liable to a fine of not less than five nor more than one hundred dollars for each pole upon which he, they or it are so in default; and each day of default to be a separate offence. Such fines to be imposed by the police justice of Richmond. (Code 1899.)

14. It shall be the duty of the chief of police to require the police captains of each police district to report to him on the last Monday in November of each year that they have had examined each pole in their respective districts used for the support of wires carrying electricity, and whether any or all are in a safe condition. The said chief of police shall, upon receipt of such reports, forward the same to the superintendent of fire-alarm and police telegraph, who shall require the person or company owning any such pole reported to be unsafe, and deemed by the said superintendent to be unsafe, to remove the same. Any such person or company who, after being so notified, shall fail to have the same removed within forty-eight hours after being so notified shall be liable to a fine of not less than

ten nor more than fifty dollars; each day's failure as to each pole so declared unsafe shall be a separate offence. (Code 1899.)

39 15. The chief of the fire department and the superintendent of fire-alarm and police telegraph shall each have power, and it shall be their duty, to examine and inspect from time to time all poles and every wire or cable over the streets, public grounds, or buildings, when such wire is designated to carry an electric current; shall notify the person or corporation owning or using such poles, when any such pole is unsafe, or owning or operating any such wire or cable whenever its attachments, insulation, supports or appliances are unsuitable or unsafe, and that the said poles, wires or cables must be properly replaced, renewed, altered or constructed; and shall require the owner of any wire abandoned for use to remove the same. Any person or company failing to perform any requirement made of him or it by either the said chief of fire department or said superintendent, under this section, shall be liable to a fine or not less than five nor more than one hundred dollars; each day's failure to be a separate offence. (Code 1899.)

16. Any person or corporation who now has permission from the city council to run wires over the streets or alleys in the city, or may hereafter obtain such permission, may obtain additional routes for its wires when his or its business shall demand the same, and when the said committee shall authorize such additional routes subject to the conditions, restrictions, limitations, and charges herein set forth. (Code 1899.)

17. All wires shall be fastened upon poles or other fixtures with glass, porcelain, or rubber insulators approved by the superintendent of the fire-alarm and police telegraph, and must be stretched tightly and fastened with a tie of the same kind of wire. No wire shall be stretched within four inches of any pole, building, or other object, without being attached to it and insulated therefrom. All wires strung on housetops must be at least nine feet clear of the roof. (Code 1899.)

18. No wire shall be within twenty-five feet of the pavement at the lowest point of sag between supports, except 40 where required to reach a lamp or other connection, and must then be protected by extra covering and be rigidly fixed and out of the way. No wire shall be run within eighteen inches of a city wire. No tree shall be cut or disturbed without consent of the city engineer. (Code 1899.)

19. All electric light and power conductors, except trolley wires, shall be secured to insulated fastenings, and covered with an insulation which is water-proof on the outside and not easily worn by abrasion. Whenever the insulation becomes impaired it must be renewed immediately. All joints must be as well insulated as a conductor, and the insulation of joints must be maintained. (Code 1899.)

20. Every wire, or cable, must be distinguished by a number plainly marked on each cross-arm under the insulator. Day circuits must be conspicuously designated. All arc lamps must be so placed as to leave a space underneath of at least nine feet clear be-

tween lamp and sidewalk. Every line for arc light or power entering a building, shall be controlled by a cut-off placed near the entrance, in sight and easily accessible. (Code 1899.)

21. In the construction of lines the insulation to be used must be approved by the superintendent of fire-alarm and police telegraph in writing, filed with the board of fire commissioners, and the insulation resistance must be maintained in accordance with the standard and to be not less than three megohms per mile per 100 volts. And under no circumstances shall underwriters' wire be used. (Code 1899.)

22. All connections with lines of electric light or power conductors shall be made at right angles to the same; and connections to buildings shall be straight across to the building and then down the front of the building. The insulation must be preserved throughout the entire circuit, and if any portion of a lamp or fixture

41 is a part of a circuit and can be touched, it must be insulated. All conductors shall have a resistance uniformly distributed of not more than thirty ohms per mile per ampere, and proportionately less for heavier current. (Code 1899.)

23. All circuits for electric light or power must be tested every hour, and when a ground comes an effort must be made to remove it at once. Failing in this, the circuit must be discontinued until the insulation is restored. No unused loops from electric light circuits shall be allowed to remain after lamps have been taken away, except in cases where it is positively known that the lamp would be required again within three months, and where there is no underground current for that class of circuits. When allowed to remain, the joint in the loop must be as well insulated as the line itself. (Code 1899.)

24. Nothing in this chapter is intended to relieve any person or company of any condition, restriction, or requirement imposed upon said person or company by the ordinance in which it has been authorized to place in the streets or alleys any poles, wires or other apparatus for the transmission of electricity. (Code 1899.)

25. Each and every provision of this chapter, unless otherwise provided, shall apply to any pole, wire or other apparatus used in connection with the transmission of electricity hereafter erected in the streets or alleys, whether the same be erected by way of repairs or for additional routes or for any other purpose. (Code 1899.)

26. Any person violating any restriction, provision or condition imposed by this chapter, or failing to perform any requirement made under this chapter by the city engineer, the superintendent of fire-alarm and police telegraph department, or chief of the fire department, as to which there is not in this chapter a fine specifically imposed, shall be liable to a fine of not less than ten nor more than

42 five hundred dollars, to be imposed by the police justice of said city; each day's violation or failure to be a separate offence. (Code 1899.)

27. The telegraph, telephone, and electric light and power overhead wires and cables (other than trolley wires), and all other overhead appliances for conducting electricity, and the

poles therefor, heretofore and now being in any street, alley, or public ground of the city, owned and maintained under any existing franchise, are hereby ordered to be removed from the following-named streets, to-wit: On Broad street from the western side of Adams street to the east side of Eleventh street; on Bank street from the western side of Ninth street to the eastern side of Twelfth street; on Main and Cary streets from western side of Seventh street to eastern side of Fourteenth street; on Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth streets from the northern side of Broad street to southern side of Cary street, within twelve months from the date of the approval of this ordinance, and any such wires hereafter installed under any existing franchise, or under any franchise hereafter granted, shall, within the limits of the above-described district, unless otherwise provided by the city council, be placed underground within twelve months from the date of permission granted by the city council. Any company, corporation, partnership, or individual, owning or controlling any such overhead wires, cables, or appliances, or poles, that refuses, neglects, or fails to remove them from overhead within the time as hereinbefore provided, or which fails to place said wires hereafter installed in the said unwerground district underground, as hereinbefore provided, shall be liable to a fine of not less than \$100 nor more than \$500 for each pole so remaining, to be imposed by the police justice of the city of Richmond, and for every week of continued failure and neglect to so remove them after the imposition of the fine above mentioned, such company, corporation, partnership, or individual shall be liable to a fine of not less than \$100 nor more than \$500, to be imposed as above stated. And any overhead wires hereafter installed

43 subject to the provisions of this chapter (March 15, 1902.)

28. That all telegraph, telephone and electrical light and power wires and cables, including feed (but excluding trolley wires) and all other appliances for conducting electricity, shall be removed from the streets, alleys and public grounds of the city of Richmond within the territory mentioned in the foregoing section within six months after the passage of this ordinance, and every individual, partnership, corporation or company owning such wires within said territory shall within two months after the passage of this ordinance submit to the committee on streets and Shockoe Creek plans and details showing the location, plan, size, construction and material of such conduits. Such plans may be altered or amended by said committee and when satisfactory to it shall be approved, and thereupon it shall be the duty of the owner of such wires to proceed with the construction of such conduits in accordance with the plans so approved and in a manner satisfactory to the city engineer. The pavement of the streets and alleys wherein such conduits are laid shall be properly replaced and shall be kept in proper repair to the satisfaction of the city engineer, and the city shall be saved harmless from any and all damages arising from laying such conduits. Such conduits shall be of sufficient capacity to accommodate the wires in such streets and alleys, and shall provide for an increase thereof to at least

the extent of 30 per cent.; such increase of space is not to be occupied by any such company, corporation, partnership or individual, directly or indirectly, without the consent of the committee on streets, but the wires of the city shall be carried in such conduits free of charge, and at least one duct shall be reserved for such wires. After obtaining the consent of the committee on streets, any other person

or corporation now having wires in the streets, or hereafter desiring to run wires therein, may occupy necessary and proper portions of such conduits and upon such terms as may be agreed upon with the petitioner; and in case of a disagreement, upon terms to be determined by arbitration as herewith provided. Any such company, corporation, partnership or individual so placing its wires underground in any street, alley or public ground of said city shall, upon notice from the city or any of its departments that a local improvement or gas, sewer or water main, or branch thereof, is to be constructed or repaired in such manner as will necessitate the moving or altering of its conduit or conduits, or their appurtenances, of said individual, partnership or corporation, move or alter the same at its own expense so as to permit the construction of the improvement where ordered, and should any company or corporation omit to comply with such notice, the conduit or conduits, or their appurtenances, may be altered or moved by the city, and the cost and expense thereof recovered from such individual, company or corporation. Man-holes shall at all times conform to the grades of the streets. The location, size, shape, and subdivision of such conduits, and the material of which they shall be made and the manner of construction, shall be satisfactory to the city engineer. The work of laying underground conduits, tubes, pipes, electrical conductors, cables and wires shall be under the direction and to the satisfaction of the superintendent of fire-alarm and police telegraph, who shall at all times have free and unobstructed access to the conduits, tubes, pipes, electrical conductors or cables for the purpose of inspecting the same or making connection therewith for conduit wires or conductors in use or to be used by the city. (December 18, 1903.)

29. Wherever any wire or cable run in such conduit shall come out of such conduit for the purpose of being continued and run overhead upon poles, all precautions which may be required from time to time by the committee on streets shall be taken for the protection and safety of all persons and property. (Code 1899.)

45 30. The terms upon which any person or company, after obtaining permission from the city council, may enter with its wires and use such conduits shall be as follows: In the event that said owner and the person or company desiring to use said conduit cannot agree upon satisfactory terms and conditions, the same shall be settled by three disinterested persons, one to be selected by such owner, one by the person or company desiring the use of said conduit, and the third by the two persons so selected; and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said con-

duit. If the said owner shall, for thirty days after having been requested in writing to appoint its representatives, fail to make such appointment, then the city engineer shall make such appointment, and the person so appointed shall have the powers he would have had if he had been appointed by the said company. If the two arbitrators, selected in either of the two manners above specified, shall fail for thirty days after their appointment to select the third arbitrator, then the city engineer shall select such third arbitrator, and when so selected he shall have the powers he would have had if he had been appointed by the said two arbitrators. Or, if after the three arbitrators shall have been appointed in any of the modes above specified, they shall fail to settle and determine said terms and conditions within thirty days from the date of the appointment of said third arbitrator, then the city engineer shall have the power to select a person who shall have power to settle and determine said terms and conditions. Should either the said owner or any person or company that may, under this section, enter upon and use the conduit of the said owner, fail to keep and perform each and every one of the terms as to the use of said conduit, the company or person so failing shall be liable to a fine of not less than fifty nor more than five hundred dollars for

such failure; each failure to be a separate offense. The said committee shall have the power to require said owner to allow any person or company desiring to enter upon and use said conduit to so enter and use the same, under such conditions as the city engineer may prescribe, as soon as the said person or company so desiring to enter shall have appointed its arbitrator; but the person or company so desiring to enter shall do so under contract and bond that he or it will abide by and conform to the terms and conditions determined upon by the arbitrators, as soon as such decision shall be announced. And the said committee shall have power also to require from time to time the said owner, or any other person or company using said conduit, to afford and furnish such protection or protections to all wires in such conduit as the committee may deem proper and necessary in order to allow such wires to perform the purposes or functions for which they were intended. For any failure to perform any requirement ordered under this section, within ten days after being notified of such requirement by the city engineer, each party so in default shall be liable to a fine of not less than fifty nor more than five hundred dollars; each day's failure to be a separate offense. (Code 1899.)

31. No privilege as to the building and owning of said conduits shall last longer than fifteen years, at the expiration of which time the city may put such other restrictions, conditions and charges as it may see fit and shall be lawful, or may order its removal at the expense of the owner. (Code 1899.)

32. For the privilege of using and occupying the streets of the city as herein proposed, each person or corporation owning or using any wire or wires run in such conduit shall each year, until January 1, 1900, pay to the city treasurer a sum equal to \$2.00 per wire per mile so owned or used by said person or company. On or after January 1, 1900, the city council reserves the right to charge such larger

17 compensation for the rest of the term of the privilege as it may see fit. Each person or corporation shall, on the fifteenth day of June and January of each year, pay to the city auditor a sum equal to \$1.00 per wire per mile then owned or used by such person or corporation, and shall render to the auditor a sworn statement as to the number and length of each of the wires then owned or used by him or it. The committee on finance may, when it may see fit, have the books of the person or corporation, rendering such statement examined by a bookkeeper employed by said committee to ascertain whether such statement is accurate. For failure to allow such examination, whenever requested by the finance committee, the person or corporation owning any wires in such conduits shall be liable to a fine of not less than one hundred nor more than five hundred dollars for each wire of said person or company admitted or proven to be in such conduit; and for failure to pay such semi-annual compensation upon the days above specified, the person or company shall be liable to a fine of not less than ten nor more than five hundred dollars; each day's failure to be separate offence. (Code 1899.)

33. The conduits herein required shall be extended from time to time, whenever required by the city council, to cover streets or alleys upon which the council may determine from time to time that no overhead wires shall be run. (Code 1899.)

34. None of the obligations, burdens and restrictions of this chapter shall, in any manner, interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866. (December 16, 1905.)

35. Every person or corporation maintaining or operating wires along the streets or alleys of this city, for the convenience of electric currents, shall construct and operate their respective lines and plants so as to prevent any electrolytic corrosion or damage to, or any electric current upon, any gas or water mains of the city or service pipes or connections thereof. (December 20, 1909.)

48 36. Every such person or corporation having now in operation any such wires shall conform to the provisions of this chapter; and for each day's failure to do so, each and every such person or company so failing shall be fined not less than fifty nor more than five hundred dollars, the said fine to be imposed by the police justice, and recoverable as are other fines and penalties. (December 20, 1899.)

37. Every such person or corporation maintaining or operating such electric wires who shall permit or allow or cause any damage to any gas or water main of the city, or to any of their connections, fixtures, or branches thereof, by electrolytic corrosion, or by the passage thereof of any electric current, shall be liable for and pay any resultant damages, and the cost for all repairs or renewals that may be necessitated by such damages or injury, and shall also save harmless the city from all damages occasioned, either directly or indirectly, to the property of any person. (December 20, 1899.)

38. The superintendent of the fire-alarm and police telegraph shall

from time to time make such examinations, investigations and surveys as will determine whether any electric current is being carried to and on any gas or water mains of the city or any branches or connections thereof; and, if a current is found to be present or to have existed, then to ascertain and determine what person or corporation is responsible for its presence; and thereupon he shall report in writing to the superintendent of the water works, or to the superintendent of the gas works (or both, if both departments are suffering from the presence of the current), the location and extent of the current or currents, and the name of the person or corporation responsible therefor. (December 20, 1899.)

39. It shall be the duty of the superintendent of the gas or water works (or both, as the case may be) to make or cause to be made such repairs or renewals as may be necessary, and to render a bill for
49 the same to the person or corporation causing the damage, and, if not paid in thirty days from the date of its presentation, to place the same in the hands of the city attorney for collection by suit, if necessary. It shall also be the duty of said superintendent of the gas or water works to report such person or corporation so violating any of the provisions of this chapter relative to damage resulting from electrolysis to the police court. (December 20, 1899.)

40. Nothing in this chapter shall be construed to relieve or release any liability already incurred, under the provisions of the ordinances approved January 23, 1899. (December 20, 1899.)

NOTE BY CLERK.—Exhibit No. 3 left out under stipulation of counsel.

Exhibit No. 4, Filed With Answer of City of Richmond.

An agreement between the City of Richmond and the Postal Telegraph-Cable Company as to settling the controversy involved in the litigation between said parties now in the Supreme Court of Appeals of Virginia. The terms are, as follows:

1st. That the proceedings are, upon the motion of the said City and with the consent of the said Company, to be dismissed.

2nd. That no penalties or fines are to be claimed or enforced against the said company because of any acts of the company complained of in said proceedings, or for any similar acts done or omitted to be done since the said proceedings were instituted.

3rd. After said proceedings shall be dismissed as agreed, if the said City shall desire the said company to conform to the ordinance of the said City as amended since said proceedings were begun, due notice shall be given under said ordinance to file
50 proper plans within two months after said notice, and to complete the work required within six months from such date.

4th. The order of dismissal shall allow to the said Company all costs in the Court of Appeals, except for the taking before the Notaries of the evidence offered by the said Company.

5th. A copy of this paper shall be filed with the Supreme Court as the basis of its decree order.

CITY OF RICHMOND.
By H. R. POLLARD, *City Atty.*
POSTAL TEL.-CABLE CO.,
By MEREDITH & COCKE.

A Copy,

Teste:

H. STEWART JONES, *Clerk.*

(Copy.)

Exhibit No. 5 Filed With Answer of City of Richmond.

(Copy from Letter Book #35, page 296.)

Office of City Engineer.

City Hall.

W. E. Cutshaw, City Engineer.

Richmond, Va.,

March 21, 1906.

Postal Telegraph-Cable Company, Richmond, Va.

GENTLEMEN: I am instructed by the Committee on Streets to notify you to submit to the said Committee, within two months from this date, plans and details showing location, plan, size, construction and material of the conduits to be constructed by you in pursuance of sections 27 and 28 of Chapter 88 Richmond City Code 1899, as amended, and that you will be required to complete your work within six months from this day. This notice is also given in pursuance of a stipulation made between H. R. Pollard, City Attorney and Meredith & Cocke, your counsel, a copy of which I enclose you.

Very respectfully,
(Signed)

W. E. CUTSHAW,
City Engineer.

Exhibit No. 6, Filed With Answer of City of Richmond.

Record 796.

In the Supreme Court of Appeals of Virginia, at Richmond.

760.

POSTAL TELEGRAPH-CABLE COMPANY

VS.

THE CITY OF RICHMOND

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The petition of the Postal Telegraph-Cable Company, a corporation created and existing under the laws of the State of Delaware, respectfully represents to your Honors that it is aggrieved by a judgment rendered by the Hustings Court of the City of Richmond on the 22nd day of October, 1913, in a proceeding brought by said City to impose a fine upon your petitioner for an alleged violation of an ordinance of said City.

A transcript of the record in said proceeding is herewith presented as a part of this petition. From said judgment your petitioner prays a writ of error and supersedeas.

Statement of the Proceedings.

The basis of the proceeding was a summons issued by the Police Justice of the City of Richmond on the 20th day of May, 1913, whereby said Postal Telegraph-Cable Company (hereinafter called the Telegraph Company) was required to show cause why it should not be fined for an alleged violation of Section 10 of Chapter 40 of Richmond City Code of 1910 in that it had failed to pay the fee required by said section upon two certain poles used, and not owned, by said Telegraph Company, in its business of receiving and dispatching telegraphic messages, which poles are located upon the streets of the said City.

On May 21st, 1913, the Police Justice of said City imposed a fine of \$10.00 upon said Telegraph Company upon the ground that it had violated said ordinance by failing to pay the fee imposed by section 10 of chapter 40 of Richmond City Code of 1910. Thereupon an appeal was taken by the Telegraph Company to the Hustings Court of the City of Richmond.

Section 10 of Chapter 40, Richmond City Code of 1910, reads as follows: (The Italics being ours).

"10. As soon as may be after the first day of the fiscal year 1900, and thereafter annually, between the first day of January and the fifteenth day of January, *all persons or corporations* shall pay to the

city treasurer a fee of two dollars for each and every telegraph, telephone, electric light, or other pole *used, possessed, or maintained* by them respectively, in any of the parks, streets, lanes, or alleys of the City of Richmond, *whether such person or corporation be the owner of such pole or not*, except trolley poles used exclusively for stringing thereon wires for use in the propulsion by electricity of street railway passenger cars. Upon the receipt of the above fee by the treasurer, the city auditor shall deliver to the person or corporation paying the same a tin plate, with a plain conspicuous number thereon, to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said

53 license fee is paid, and shall also enter in a book, to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of poles for which it is issued, and the number of the tin plates delivered to the person paying such license fee. He shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specific number of poles, and has received the tin plates of the given number therefor. Such person or corporation then shall have one of such tin plates securely fastened in some conspicuous place upon each of the poles used, possessed, or maintained by it or him, as may be designated by said superintendent."

When the case came up for hearing before said Hustings Court on the 11th day of October, 1913, the Telegraph Company entered a plea of not guilty, but with a stipulation agreed to by both parties, by counsel, that under that plea the Telegraph Company might and did defend upon the ground that the aforesaid section of the City ordinances is unlawful and void, and if not, then so much thereof is unlawful and void as imposes a fee of two dollars per pole upon poles "used," but not owned by the using Company, for the following reasons:

"1st. Because the said ordinance deprives the said Company of its property without due process of law and is, therefore, in violation of Section 1 of Article 14 of the Constitution of the United States.

2nd. Because it denies the said Company the equal protection of the laws in violation of Section 1 of Article 14 of the Constitution of the United States.

3rd. Because it violates the rights and privileges secured to said Company by the Act of Congress approved July 24th, 1866, entitled

54 *an 'An Act to aid in the construction of telegraph lines and to secure the Government the use of the same for postal, military and other purposes'* and the acts of Congress amendatory thereof.

4th. Because it interferes with and is a burden upon the occupation of said Company as an agency of the United States Government in transmitting messages for said Government under the aforesaid Act and under an Act of Congress approved June 10, 1872, entitled "An Act making appropriations for sundry civil expenses of the

Government, for the fiscal year ending June 30, 1873, and for other purposes.

5th. Because it imposes an unlawful burden upon and interferes with the interstate commerce in which said Company is engaged, and is in violation of Section 8 of Article I of the Constitution of the United States.

6th. Because it is laid for revenue purposes, and not as a reasonable charge for inspection.

7th. Because, if laid as a charge for inspection, it is unreasonable and excessive.

(See Mss. Record, p. 2.)

The whole matter of law and fact was, by consent, submitted to the Judge of said Court for decision and judgment.

The case was then heard by the court upon an agreed statement of facts (Mss. Rec. pp. 6-12) and the exhibits therewith (Mss. Rec. pp. 13-83); upon an affidavit by Theodore L. Cuyler, Jr., Assistant Treasurer of the Telegraph Company (Mss. Rec. pp. 84-87); upon the oral testimony of various witnesses (Mss. Rec. pp. 88-149) and upon proof of Sections 7, 8, 11, 19 and 22 of Chapter 32 of Richmond City Code of 1910.

At the conclusion of the hearing, the said Court, after taking time to consider of its judgment, on October 22, 1913, rendered its decision that said Telegraph Company was guilty of the violation as charged and imposed a fine of Fifteen Dollars upon it, entering judgment therefor. To the said decision and the entry of judgment thereon, said Telegraph Company objected, which objection the Court overruled and entered said judgment, and the said Telegraph Company thereafter, within the time prescribed by law, tendered its Bill of Exceptions No. 2, which were duly signed and sealed by the Judge of said Court.

After the entry of said judgment, the Telegraph Company, by counsel, moved the court to set aside said judgment and award it a new trial upon the ground that it was contrary to the law and the evidence, which motion the Court overruled, to which action the Telegraph Company, by counsel, excepted. See Bill of Exceptions No. 3.

During the progress of the hearing, the Telegraph Company, by counsel and under the rights reserved to it under said Agreed Statement of Facts (Mss. Rec. p. 6) objected to the introduction of the facts set forth in Clauses 4, 5, 6 and 9 of said Agreed Statement, as improper, immaterial and irrelevant, which objections the Court overruled and admitted and considered such facts as evidence, to which action said Telegraph Company duly excepted and made it the basis of its Bill of Exceptions No. 1.

From the record the following facts appear:

That the said Telegraph Company is a corporation created under the laws of Delaware, engaged in the business of receiving, transmitting and delivering telegraph messages; that it has duly accepted the provisions of an Act of Congress adopted July 24, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines and to secure to the Government the Use of the Same for Postal, Military and other

purposes"; that said Company is engaged in interstate commerce and also as a telegraph agency of the Government of the United States; and that the wires, poles (whether owned or used but not owned by it) and the equipment of said Company located in the City of Richmond are used in such occupation. (Mss. Rec. p. 10.)

56 It appears that neither of the two poles involved in this proceeding are owned by said Telegraph Company, but that both are used by it for the support of its wires. One of said poles is owned by the Chesapeake & Potomac Telephone Co. of Va., and is used by the owner, by the Postal Telegraph-Cable Company, and by the City of Richmond, while the other of said poles is owned by the Virginia Railway & Power Co., and is used by the owner, by the Postal Telegraph-Cable Co., by the Western Union Telegraph Company and by the Chesapeake & Potomac Telephone Co. In many instances, in the City, a pole which is owned and used by one Company only, carries twenty or thirty wires, whereas in other instances there are only three wires upon a pole, each of which belongs to a different company. (Mss. Rec. p. 7.)

It also appears that the Telegraph Company has paid the fees, required by the ordinance, upon all poles owned by it, but has refused to pay the fees assessed against it upon poles used by it, but owned and used by other companies (Mss. Rec. p. 8); that the aggregate tax for 1911 assessed upon poles by virtue of said ordinance was \$15,204.00 (Mss. Rec. p. 8); that for 1912 this tax aggregates \$16,236.00 (Mss. Rec. pp. 10-12.)

The streets and alleys of said City are post roads under the Act of Congress on that subject (Mss. Rec. p. 9).

Argument.

It is to be noted at the outset that in this case there has been raised United States Constitutional questions as well as questions arising as to the construction and effect of Acts of Congress.

Petitioner does not assert that the City of Richmond has no authority to impose a fee or tax upon telegraph polls located in its streets. It recognizes the fact that such charges, where properly imposed, are valid. But upon the imposition of such charges there are important limitations arising from the fact that the Act of
57 Congress adopted July 24th, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines and to secure to the Government the Use of the same for Postal, Military and Other Purposes," provides that "any telegraph company * * * shall have the right to construct, maintain and operate lines of telegraph * * * over and along any of the * * * post roads of the United States * * *

A city, notwithstanding this statute, has the right, under its police powers, to provide for the inspection of telegraph poles located within its streets and to make a charge therefor, but this charge must be based upon the reasonable cost of such inspection and can not be made for the purpose of raising revenue.

This general question has been before the U. S. Sup. Court in

many cases. Each case turned upon its own facts and circumstances. See 190 U. S., on p. 167. But in them all, we insist, it recognized the limitation of the right of power above stated.

The right of a city to exact such fees seems to have been first questioned in the case of the Western Union Telegraph Company vs. St. Louis, 148 U. S. 92. The power was upheld in that, as appears from the following language on pages 104-105:

"Indeed, it may be observed in the line of thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the City; that all that it can insist upon is, in this respect reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. This inquiry must be open in the courts," etc.

This case appears again in 149 U. S. 465. Subsequently the fee there charged of \$5.00 per pole was held to be excessive, and, therefore, illegal. 463 Fed. 68.

In the case at bar the City, by taxing two persons as to one pole gets \$1.00, and by taxing four persons as to the other gets \$8.00. Hence, it can not be a charge for inspection, but for revenue—the amount of which will vary according to the number of persons using the poles besides the owner.

It will be seen that the power in that case was based upon the right to charge a rental for the occupation of so much land per pole. It is manifest that it is practically impossible to ascertain a fair basis of charge upon such a theory of compensation. It will be seen from the subsequent decisions that that basis of charge has been abandoned, and the Courts have now declared the right to make such a charge as arising under the police powers of a municipality. The Courts have also held that, being an exercise of the police powers, it must be exercised only to such a reasonable extent, as will allow to be accomplished the object in view in the exercise of such a power, viz: the safety of the public. Hence, the Courts reason, as the City is put to an expense, in ascertaining and seeing that the poles are kept in a proper and safe condition, she has the right to charge such a fee as will reasonably recompense her for such outlay and expense.

But the Courts unanimously hold that a city has no right to impose such a fee for the purpose of raising revenue.

Such is the distinction drawn and insisted upon, in the numerous decisions had upon this subject. Such being the distinction, it is evident that each case turns and depends upon its own facts and circumstances.

In *At. & Pac. Tel. Co. vs. Philadelphia*, 190 U. S. 160, it is said on page 166—

In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not

59 bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation subject the corporation to a charge for the expense of the supervision.

But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True, it is often said that a license tax is in its nature arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed or its profitableness. But such observations are pertinent only in case the license is resorted to for the purpose or revenue. When it is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge, and if it were possible to prove in advance the exact cost that would be the limit of the tax."

The distinction between a charge under the police powers and a revenue exaction, is clearly stated in *North Hudson, etc., Co. vs. Holoken*, 41 N. J. L. 71-81, as follows:—

"The distinction between the power to license, as a police regulation, and the same power when conferred for revenue purposes, is of the utmost importance. If the power be granted with a view to revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities; but if it be given as a police power for regulation merely, a much narrower construction is adopted; the power must then be exercised as a means of regulation, and can not be used as a source of revenue. *Cooley on Taxation* 408—*Cooley on Con. Lim.*, 201.

A similar distinction is noted in *A. D. Postal, etc., Co. vs. Savannah*, 133 Ga. 66-71,—

"There is a wide difference in the power to tax a business with a view to its regulation, and the power to tax it for the sole purpose of revenue. The former inheres in the exercise of the city's police power, while the latter is an exercise of the power of taxation."

60 The restriction upon a city in a question of this kind is clearly declared in the following language from the case of *Western Union Tel. Co. vs. New Hope*, 187 U. S., p. 286:

"Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied not by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts and is to be determined upon a view of the facts, and not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise, and the expense of the same."

In *Burroughs, etc., vs. American Gas Co.*, 86 Atl. (Pa.) 717, we find not only a recognition of the principle above recognized, but

also a discussion of the evidence upon the question at issue, which is, we submit, most appropriate to this case:

"When such a license fee is imposed, the kind, character and cost of inspection must necessarily be the guiding thought of those whose duty it is to deal with the question.

The inspection was made by police officers, and the testimony is very meager as to the extent and cost of such inspection. The Borough paid these police officers fixed salaries for the performance of all their duties, which, of course, included the duty of inspection under the ordinances in question. But all of these things should be the subject of definite proofs, when the reasonableness of the ordinance is attacked and the matter is before the Court for judicial inquiry.

We fully agree that in matters of this character, municipalities must be given reasonable latitude in fixing annual license fees to cover anticipated expenses to be incurred in making necessary inspections and exercising supervision over the lines of public service corporations as a protection to the public, and that the courts should resolve all doubts in favor of the validity of such ordinances. But on the other hand, it will not do to shut our eyes to the real facts and permit a municipality to do that which the law says must not be done; that is, raise general revenue under the guise of a police regulation."

A similar and forceful discussion appears in the opinion in *City of Saginaw vs. Elec. Light Co.*, 113 Mich. 660-652:

"If, as contended by counsel, it were clear that this provision was not designed to secure the safety and protect the public against dangers, or if it were clear that it was an attempt to raise revenue under a pretense, we should not hesitate to hold the ordinance invalid. The ordinance provides for nothing but an inspection of poles once a year to ascertain, whether the same are secure and maintained in accordance with the ordinance. While we think it is proper for the city to make a reasonable inspection, and we are not prepared to say that this is not a reasonable one, there is no occasion for requiring the Electric Company to pay more than a sum sufficient to pay the reasonable cost of such inspection. The pole is in plain sight, may be easily ascended, if necessary and an examination as to soundness below the surface cannot be difficult or expensive. We may take judicial notice of these things."

Held, that, as charge was \$5.50 per pole, and cost of examination about \$.05 per pole, it was unreasonable.

We also ask consideration of the opinion in the case of *Wis. Tel. Co. vs. Milwaukee*, 126 Wis. 1-13:

62 "The ordinance requires telegraph and telephone companies to apply annually for a license to maintain, for the ensuing year, the poles and cross-arms then erected, and provides for payment, for the use of the city, of \$1.00 for each and every pole authorized to be maintained thereby. The ordinance further provides that all revenue derived from such license shall become part of the general city fund, and imposes a penalty for any violation, and further provides that all revenue derived from such license

shall become part of the general city fund, and imposes a penalty for any violation, and further provides that the erection or maintenance of any single pole or cross-arm in violation of the provisions thereof shall continue a distinct and separate offense thereunder. The plain import of this ordinance is that it grants the privilege to telephone and telegraph companies to occupy the streets of defendant city with their poles and cross-arms in consideration of the license fee erected.

There is nothing in the ordinance indicating that the fee is exacted for inspection or supervision, or that it will be used for such purposes, and that any such amount is necessary to defray the expenses of such inspection and supervision; and it is quite obvious that the aggregate amount sought to be collected would be *far* beyond the reasonable expense of such inspection and supervision.

Even if the city had the right to impose reasonable charges for inspection and supervision, it should not be permitted, under the guise of such power, to collect large amounts of revenue for the benefit of the city, regardless of the amount necessary for such inspection and supervision. And where the court can clearly see that revenue and regulation is the aim and not the incident, and no power is given to license the occupation, the ordinance is void."

In the Wisconsin case the Court first showed that the city
63 under its charter had no power to grant pole license for revenue. Nor will it be claimed in this case that the city of Richmond has any power to make against us any such charge for the purpose of revenue.

Such are the fair and reasonable views held by the courts, where the charge is a single one, imposed only on the owner. Such language should be even more persuasive, when an additional tax is without any reason imposed also upon each user.

We ask the special attention of the Court to the case of Postal Telegraph-Cable Company vs. Taylor, 192 U. S. 61.

In that case, the court, after noticing the great difference between any cost of inspection and the amount arising under the ordinance, and also the small amount of inspection made by the city, says:

"When we come to an examination of the grounds upon which this kind of tax is justifiable, and when we find that in this case each one of those grounds is absent, how is it possible to uphold the validity of such an ordinance. To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet because it is said to be an inspection measure, the court must take it as such and hold it valid, although resulting in a rate of taxation, which, if carried out throughout the country, would bankrupt the company, were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that does not exist in fact."

It also uses this strong language:

"Courts are not to be deceived by the mere phraseology in which an ordinance may be couched when it appears conclusively
64 that it was passed for an unlawful purpose and not for the one stated therein.

A license fee cannot be imposed by ordinance of a municipality for purposes of inspection on telegraph companies, doing an interstate business which is so far in excess of the expenses of inspection that it is plain that it was adopted not to defray such expenses, but as a means for raising revenue."

The Court also declares that a city in estimating its cost of inspection of the poles, cannot add anything for a possible liability from an action of tort by some person injured by such poles. This is peculiarly true in this case, as by the 20th clause of the Agreed Facts (Mss. Rec. p. 9), the city is virtually protected from any judgment in such a suit.

Such being the well settled principles upon the question here at issue, we submit, that, both from the evidence and from the ordinance itself, the ordinance is one for revenue, at least so far as the tax is imposed upon users as well as upon the owner.

As was said in *Postal Telegraph-Cable Co. — Adams*, 155 U. S. 688-698:

"The substance and not the shadow determine the validity of the exercise of the power."

Looking at the ordinance itself, we do not find any intimation that the fee is charged for the recoupment, of the expenses of any inspection. The fees so imposed are required to be paid "to the City Treasurer," and, as stated in the Agreed Facts, becomes a part of the general funds of the city. (Mss. Rec. p. 12.)

No inspectors are appointed for such work of inspection, but the duty of inspection is by the ordinance put upon those who were at that time salaried officers of the city. No proof has been produced that any extra or additional subordinates have been appointed to assist in any inspection.

In the 32nd Section of the same ordinance a similar fee of \$2.00 is imposed upon every mile of wire, which is run in a conduit.

There is no charge made for wires run overhead, where they
65 are dangerous, but the charge is imposed upon those run in conduits, where they are not dangerous. No inspection is required to be made of these wires in conduit, although the fee is charged. In fact, no inspection could be made of them, except at the manholes; for, of course, there is no way of getting at the wires so run, except at those openings. In the same section, we find a right reserved to charge, after January 1, 1900, a "larger compensation," or a larger fee.

It is manifest from such a provision that no other idea was had in view as to such wires, except that of revenue. This being true as to one part of an ordinance upon the subject of wires, it is but reasonable to hold that the same idea was in view when the part as to poles was adopted. Especially is this true when we find that that part imposing fees upon poles is not confined in its imposition to the owner of the pole, but is also demanded of every user of a pole, al-

though the owner may have many wires upon a pole, while each user may have only one. Hence the size of the fee is not fixed by the number of the wires thereon; nor is the number of fees charged as to any pole fixed, except by the number of users.

Hence for a large pole only \$2.00 may be imposed, while for a small one \$6.00 or \$8.00 may be demanded.

Such a system of charging can only be based upon the theory of revenue. The expense of inspection of a pole is no greater, when the fees required are \$8.00, than they are where the fee is \$2.00. Hence the charge against a mere user must be for revenue purposes.

The duty of the city under the law was to try to ascertain what would be a reasonable charge per pole to reimburse her for the expenses of inspection. It is true that she was not required to be exact, but she was called upon to fix the charge upon some reasonable basis.

As was said in *Postal, etc., Co. vs. Taylor*, 192 U. S. p. 70:

66 "And if it were possible to prove in advance the exact cost, that sum would be the limit of the law. * * *. The municipality is at liberty to make the charge enough to cover any reasonably anticipated expenses," etc.

Upon the system stated in said 10th Section of said ordinance, it was impossible to even estimate what charge would so reimburse her. At one time a pole might be yielding \$2.00, while at another it might yield \$1.00, \$6.00 or \$8.00. It is evident, therefore, that the city was not attempting to determine a reasonable charge, so as to be reimbursed for the expenses of inspection, but she only had in mind the idea of deriving a revenue from all persons owning, maintaining or using a pole.

Hence, so far as it appears from the face of the ordinance the fee charged was not for the purpose of a reasonable reimbursement for the expenses of inspection.

It is also submitted that the facts disclosed by the evidence fail completely to show the necessity for the charge as a reasonable cost of inspection. Let us see just what inspection the City gives.

It appears that Wm. H. Thompson is City Electrician and is Superintendent of Fire Alarm and Police Telegraph. The total annual cost of maintenance of his two departments is \$16,709.80. (Mss. Rec. p. 92). Among other numerous duties these two departments have charge of the installation, maintenance and repair of the City's entire system of Fire Alarm and Police Telegraph, a system the extent of which can be appreciated from the fact that the Fire Alarm Telegraph alone needs the use of over 2,000 poles belonging to the local public service corporations. (Mss. Rec. p. 12). These departments inspect all wires running into houses (Rec. p. 94). They inspect and watch the electric wiring of each new house built in the City of Richmond (Rec. p. 97). They look after and keep in repair all electrical apparatus owned and controlled by the City (Rec. p. 99). It appears from Thompson's testimony that his office makes no general inspection of poles (Rec. p. 95), save such as is necessary for the maintenance of the City's

67 telegraph system. A special inspection is made of a pole

only when complaint of that pole is made (Rec. p. 90), and in three years only 162 poles have been reported as defective (Rec. p. 9) by the Police Department.

The Chief of the Fire Department testifies that his department makes no general inspection of poles; that its inspection consists mainly of reporting a pole if, in passing through town, one of his men sees it and thinks it is dangerous. (Rec. p. 107).

Taking the testimony of the Chief of Police in the light most favorable to the City, it appears that once a year the Chief orders the Captains to instruct their patrolmen to inspect all poles in the city streets; that these inspections are made by the men while engaged in their regular and necessary duty of patrolling their beats and consist mainly of tapping the poles with their clubs as they pass; and that throughout the year the men, while engaged in their regular duties, are on the lookout for and report any defective poles which they see. It is manifest that such inspection is perfunctory.

W. A. Barfoot, one of the Police Captains, testifies expressly that these inspections are made as the patrolmen is performing his usual duties on his beat. (Rec. pp. 144 and 145.)

In the Southern portion of the City, formerly the City of Manchester, a special man is detailed once a year to inspect the poles, and it sometimes takes him a couple of days to make the inspection (Rec. pp. 146 and 147). The salary of the patrolmen is \$3.02 a day (Rec. p. 134).

Such is the character and the extent of the inspection given by the City of Richmond to the poles in its streets, and for which is claimed reimbursement to the amount of approximately \$16,000.00 per annum. The entire office of the City Electrician and Superintendent of Fire Alarm and Police Telegraph, employing ten men and performing many and varied duties for the City at a total cost of \$16,709.80, makes no general inspection save a cursory examination while performing other duties and save an inspection

68 of those specially reported to it (a total of 162 in the past three years); the Police Department inspecting only in connection with the regular patrol of the beats, except in one of the large wards of the City, wherein one policeman, at a salary of \$3.02 per day, sometimes requires as long as two days to perform his special duty of annual inspection, and the Fire Department making no inspection whatever.

Under such a state of facts, can it be said that under Section 10 of Chapter 40, Richmond City Code of 1910, the City of Richmond in producing an income of \$16,000.00 annually has not exceeded that measure of the reasonable cost of inspection and has not gone far into the field of revenue? If such be the case, we earnestly submit that the ordinance conflicts with that principle laid down by the Supreme Court of the United States in the case of Postal Telegraph-Cable Co. vs. Taylor (*supra*), where it was said:

"A license fee can not be imposed by ordinance of a municipality for purposes of inspection on telegraph companies doing an interstate business which is so far in excess of the expenses of inspection

that it is plain that it was adopted, not to defray such expenses, but as the means for raising revenue."

The ordinance is, therefore, invalid, and the Hustings Court erred in rendering its decision that petitioner was guilty of violating the same and entering its judgment thereon, and thereafter erred in overruling petitioner's motion to set aside its said decision and judgment as contrary to the law and the evidence.

There can not be the slightest justification for more than a single tax of Two Dollars upon the owner. While, of course, the amount of the fine in this cause is in itself of but little importance, yet the question involved is of far greater moment, when we consider the annual cost to be borne, and the possibility that other cities may adopt an ordinance with a similar burden.

Your petitioner further submits that said Court erred in
69 allowing and considering as evidence in this proceeding Clauses 4, 5, 6 and 9 of the Agreed Statement of Facts and the Exhibits referred to in said clauses 4 and 5.

Said clauses 4, 5 and 6 refer to a certain mandamus proceeding heretofore had in this Honorable Court between the parties to this present proceeding. In that proceeding the sole question in issue and the only relief prayed for by the City was to compel your petitioner to place certain of its wires underground in compliance with two sections of the City ordinances, the validity of which are not now being attacked by your petitioner (Mss. Rec. p. 25 Prayer of Petitioner). An agreement was reached and entered of record, whereby your petitioner agreed, upon due notice, to comply with the ordinance by placing its wires underground (Mss. Rec. p. 67). It is earnestly submitted that such proceedings and such an agreement have absolutely no relevancy to the questions presented in this case, and that the consideration thereof by the Court was error to the prejudice of petitioner.

Your petitioner also insists that the fact that several other companies doing business in the city of Richmond have paid, without protest, the tax which your petitioner claims is unlawful and void, as set forth in clause 9 of the Agreed Facts (Mss. Rec. p. 7), could have no possible bearing or effect upon the right of petitioner to make its own defense to what it considers an unjust tax. These companies were in no way connected with petitioner and petitioner has no control over and should not be held accountable for any action they may take. We submit, therefore, that the Court also erred in admitting and considering as evidence the facts set forth in said clause 9 of the Agreed Facts.

For the foregoing reasons, petitioner is advised that said Hustings Court erred (1) in entering its judgment against petitioner upon the evidence produced before it and under the law applicable thereto; (2) in refusing to set aside its judgment and award petitioner a new trial; and (3) in admitting and considering as evidence
70 the facts set forth in clauses 4, 5, 6 and 9 of the Agreed Statement of Facts, and the Exhibits referred to therein, and for these and other reasons to be assigned at bar, your petitioner

prays that the said judgment complained of may be reversed and annulled, and a new trial granted your petitioner.

And, as in duty bound, your petitioner will ever pray, etc.

POSTAL TELEGRAPH-CABLE COMPANY,
By MEREDITH & COCKE,
LEAKE & BUFORD,
Its Counsel.

We, C. V. Meredith and A. S. Buford, Jr., Attorneys practising in the Supreme Court of Appeals of Virginia, certify that, in our opinion, the judgment complained of in the foregoing petition, should be reviewed and reversed.

C. V. MEREDITH,
A. S. BUFORD, JR.

Received Jany. 17th, 1914.

JAMES KEITH.

VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond, on Wednesday, the 21st Day of January, 1914.

Upon the petition of the Postal Telegraph-Cable Company a writ of error and supersedeas is awarded it to a judgment rendered by the Hustings Court of the City of Richmond on the 22nd day of October, 1913, in a proceeding brought by said City to impose a fine upon the said petitioner for the alleged violation of an ordinance of the said City, upon the petitioner, or some one for it, entering into bond with sufficient security in the clerk's office of the said

Hustings Court in the penalty of three hundred dollars and
71 with condition as the law directs.

A copy,

Teste:

H. STEWART JONES, C. C.

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true and accurate copy of the petition for a writ of error in the case of Postal Telegraph-Cable Company against the City of Richmond, upon which petition a writ of error was awarded on the 21st day of January, 1914, the said writ of error afterwards being dismissed agreed on the 18th day of November, 1914.

Given under my hand this 23rd day of July, 1915.

H. STEWART JONES,
*Clerk of Supreme Court of Appeals
of Virginia, at Richmond.*

VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond, on Wednesday, the 18th Day of November, 1914.

POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff in Error,

against

CITY OF RICHMOND, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Hustings Court of the City of Richmond on the 22nd Day of October, 1913.

This day came the parties, by counsel, and upon the motion of the plaintiff in error, it is ordered that this cause be dismissed at the costs of the plaintiff in error.

Which is ordered to be certified to the said Hustings Court.

A copy.

Teste:

H. STEWART JONES, C. C.

72 STATE OF VIRGINIA.

City of Richmond, To wit:

Pleas at the Court-house of the City of Richmond, Before the Hustings Court of the said City, on the 19th Day of November, 1913.

Be it remembered that heretofore, to-wit, on the 3rd day of June, 1913, the Postal Telegraph-Cable Company filed in the Clerk's Office of said Court its appeal from the judgment of the Police Justice of said City, convicting it of a violation of an ordinance of said City, as set forth in the summons issued by the said Police Justice, which summons is in the words and figures following, to-wit:

CITY OF RICHMOND, *To wit:*

To Any Police Officer of said City:

Summon Postal Telegraph Cable Company, 1246 East Main Street (Vernon H. Borst, Manager), to appear before me or some other Justice of the Peace of said City, at the Police Justice's Court, in the City Hall, on the 21st day of May, 1913, at the hour of 9:30 o'clock A. M., to show cause, if any it can, why a fine of not less than five nor more than 100 dollars should not be imposed on it for violation of Ordinance of said City, in this to-wit, that it failed to pay the fee required by Chapter 40, Section 10, Richmond City Code, 1910, on two certain poles used by it in the streets of the City of Richmond, between the 1st and 15th day of January, 1913, as required.

to-wit: a certain pole numbered 1917 belonging to the Chesapeake and Potomac Telephone Company of Virginia, as successor of the Southern Bell Telephone Company of Virginia, located on the South side of Byrd Street, between 10th and 11th Streets, in the said City; and a certain other pole numbered — belonging to the Virginia Railway & Power Company, located on the Western side of Sixth Street between Broad and Grace Streets in the said City, whereby it is liable to the fine imposed by Chapter 40 section 13 of the said Code.

And be you then there to certify what you have done in the execution thereof.

Given under my hand and seal in said city, this 20th day of May, 1913.

JOHN J. CRUTCHFIELD, [SEAL.]
Police Justice.

The following is a copy of the judgment of the said Police Justice:

In the Police Justice's Court of the City of Richmond, May 21st, 1913.

The said Postal Telegraph & Cable Co., Vernon H. Borst, Mgr., was this day tried by me for the offence charged on the within summons, and upon such trial, they the said Postal Telegraph & Cable Co. was duly convicted by me of violating the City Ordinance and sentenced by me to pay a fine of \$10.00 from which the said Company appeals.

Given under my hand this 21st day of May, 1913.

JOHN J. CRUTCHFIELD,
Police Justice.

And at another day, to-wit: At a Hustings Court held for the said City at the Courthouse on the 11th day of October, 1913, came the City of Richmond, by H. R. Pollard, City Attorney, as well as the said Defendant Company by Meredith & Cocke and Leake & Buford, it Attorneys, and by its Attorneys entered its plea of not guilty, with the following stipulation, to-wit:

Stipulation as to Pleadings.

CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY.

It is stipulated and agreed between counsel for the respective parties to this proceeding, that while the Postal Telegraph-Cable Company enters only the plea "Not Guilty," yet that under this plea the said Company may and does defend upon the grounds that

71 Section 10 of Chapter 40 of the Richmond City Code of 1910 is unlawful and void, and if not, then so much thereof is unlawful and void as imposes a fee of Two Dollars per pole upon poles "used" but not owned by the using Company, for the following reasons:

1st. Because the said ordinance deprives the said Company of its property without due process of law and is therefore, in violation of Section 1 of Article 14 of the Constitution of the United States.

2nd. Because it denies the said Company the equal protection of the laws in violation of Section 1 of Article 14 of the Constitution of the United States.

3rd. Because it violates the rights and privileges secured to said Company by the Act of Congress approved July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure the Government the use of the same for postal, military and other purposes" and the acts of Congress amendatory thereof.

4th. Because it interferes with and is a burden upon the occupation of said Company as an agency of the United States Government in transmitting messages for said Government under the aforesaid Act and under an act of Congress approved June 10, 1872, entitled "An Act making appropriations for sundry civil expenses of the Government, for the fiscal year ending June 30, 1873, and for other purposes."

5th. Because it imposes an unlawful burden upon and interferes with the interstate commerce in which said Company is engaged, and is in violation of Section 8 of Article 1 of the Constitution of the United States.

6th. Because it is laid for revenue purposes, and not as a reasonable charge for inspection.

7th. Because, if laid as a charge for inspection, it is unreasonable and excessive.

It is further stipulated and agreed that the order of the Hustings Court of the City of Richmond setting forth the above mentioned plea of said Company shall also expressly state that the
75 said Company, under said Plea, relies upon and asserts the above mentioned matters of defense, and the said order shall state said defenses serialim.

H. R. POLLARD,

Counsel for the City of Richmond.

MEREDITH & COKE AND

LEAKE & BUFORD,

Counsel for Postal Telegraph-Cable Company.

And neither party requiring a jury, the whole matter of law upon the agreed statement of facts, this day filed, and upon evidence of witnesses heard in open court, is submitted to the judgment and decision of the Court; and the Court having heard the evidence and arguments of counsel, and not being at present advised of its judgment and decision in this matter, takes time to consider thereof.

NOTE BY CLERK.—The stipulation as to pleadings is not recopied in this record because it has already been set forth in full in the preceding order of court.

And at another day, to-wit: at the same Hustings Court continued by adjournment and held for the said City at the Court house, on the 22nd day of October, 1913, again came the City of Richmond by H. R. Pollard, City Attorney, as well as the defendant, by Meredith & Coker and Leake & Buford its Attorneys, and the Court having fully heard and maturely considered the evidence and arguments of counsel, is of opinion and doth decide that the said Postal Telegraph-Cable Company is guilty of the violation of the City ordinance as charged, and doth impose upon it, the said defendant, a fine of Fifteen Dollars. Whereupon it is considered by the Court that the City of Richmond recover against the said defendant a fine
76 of Fifteen Dollars, together with its costs by it in this behalf expended.

To which action of the Court in giving judgment against it, the said defendant, by its attorney, excepted, and moved the Court to set aside the said judgment on the ground that the same is contrary to the law and evidence and grant it a new trial, which motion the Court overruled; to which action of the Court in overruling its said motion the defendant by its Attorneys excepted, and by agreement of parties made at Bar through their respective Attorneys, and hereby entered of record, time is allowed the said defendant, not to exceed sixty days from the expiration of the present term of this Court, to prepare and file all of its Bills of Exceptions.

And at the request of the said defendant, by its Attorneys, the execution of the said Judgment is suspended for a period of ninety days from this day, in order to allow it time to apply to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to the judgment aforesaid.

And now at this day, to-wit, at a like Hustings Court, continued by adjournment, and held for the said City at the Courthouse on the 19th day of November, 1913 (being the same day and year first hereinbefore written) the said defendant in accordance with the leave of the Court heretofore granted it, this day by its Attorneys presented to the Court its several Bills of Exceptions, which are received, signed and sealed by the Court and made parts of the record in this case; which said Bills of Exceptions are as follows, to-wit:

In the Hustings Court of the City of Richmond.

CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY.

Bill of Exceptions No. 1.

77 Be it remembered that upon the trial of this cause after both sides had waived a hearing before a jury and had submitted the case to the Judge of said Court to be heard upon the pleadings and evidence. A statement of agreed facts was offered in evidence, as set forth in Bill of Exceptions No. 2, to which reference is hereby made. Thereupon the Postal Telegraph-Cable Company, under the right reserved in said statement of agreed facts, objected to the introduction of the facts set forth in clauses or paragraphs Nos. 4, 5, 6 and 9 of said statement, as improper, immaterial and irrelevant, but the court overruled said objections and allowed in said evidence, to which ruling of the Court the said Company objected and filed this its Bill of exceptions No. 1, and prayed that the same might be signed, sealed and made a part of the record; which is accordingly done.

D. C. RICHARDSON, *Judge*. [SEAL.]

In the Hustings Court of the City of Richmond, Virginia.

CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY.

Bill of Exceptions No. 2.

Be it remembered that upon the trial of this cause after both sides had waived a hearing before a jury and had submitted the case to the judge of said Court to be heard upon the pleading and evidence, the following evidence was introduced:

Stipulation as to Agreed Facts.

VIRGINIA:

In the Hustings Court of the City of Richmond.

CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY.

On An Appeal From the Police Justice of the City of Richmond.

It is stipulated and agreed between the parties in the above entitled case subject to exception by either party as to the relevancy of any one or more of said facts, as follows:

78 1. That the Postal Telegraph-Cable Company, a corporation created under the laws of the State of Delaware, obtained permission to erect poles and run suitable wires thereon in the City of Richmond by an ordinance of the City Council, approved March 16, 1889, which ordinance is herewith filed marked "Agreed Facts-Exhibit No. 1," which shall be read as a part of this stipulation as if the same was incorporated herein.

2. That after the enactment of the said ordinance the defendant company, in pursuance of Section 1 of said ordinance, applied to and obtained from the Committee on Streets the right to erect poles and run wires on certain streets of the City, and in pursuance of said permission proceeded to erect its said poles and run its wires on the streets of the city, and has from that time to the present time maintained said poles and wires on some of the streets of the City, and since 1906 has maintained its wires in conduits in others.

3. That by an ordinance approved September 10, 1895, embodied, with certain amendments thereto in Richmond City Code 1899, as Chapter 88, it was provided, by Sections 27 and 28, that all telegraph, telephone and electric light and power overhead wires and cables, (other than trolley wires), and all other appliances for conducting electricity, and the poles therefor, theretofore and then in any street, alley or public place of the City, owned and maintained under any existing franchise, were ordered to be removed and placed underground in certain territory (known as the underground district) within twelve months from the date of the approval of said ordinance, and subsequently said Section 27 was amended by an ordinance approved March 15, 1902, and Section 28 by an ordinance, approved December 18, 1903.

4. That on the 8th day of September, 1904, the defendant company having failed to comply with said Sections 27 and 28 of said Chapter, the City of Richmond filed a petition in the Supreme Court of Appeals of Virginia praying a writ of mandamus compelling the said company to comply with said Sections by placing their wires underground in certain territory

within the City of Richmond, to which petition the defendant company filed its answer, copies of which petition and answer are herewith filed marked "Agreed Facts-Exhibit No. 2," to be considered as a part of this stipulation, as if the same was fully set forth herein.

5. That after the said case in the said mandamus proceedings in the said Supreme Court of Appeals of Virginia had matured for a hearing, but before the decision had been made by the Court, the City at the suggestion of the City Attorney adopted the ordinance containing Section 34 of Chapter 40, Code of Richmond, 1910, in order to meet the position taken by the counsel for the company in its supplemental brief— which reads as follows—

"The defendant assents to proceed and construct this underground conduit if the City will acknowledge that the defendant does not hereby waive its federal franchise."

And thereafter an agreement in writing was entered into between the City of Richmond and Messrs. Meredith & Coker, representing the defendant company, by which "the controversy involved in the litigation between the said parties" was settled, the exact terms of which agreement are set forth in a paper herewith filed marked "Agreed Facts-Exhibit No. 3," which is to be read and considered as a part of this situation as completely as if the same were fully set out herein, and accordingly the said case was on February 24, 1906, dismissed.

6. That on March 24, 1906, W. E. Cutshaw, City Engineer of the City of Richmond, addressed a letter to the Postal Telegraph-Cable Company informing it, that he was instructed by the Committee on Streets to notify them to submit to said Committee within two months from that date "plans and details, showing location, plan,

size, construction and material of the conduits to be constructed by you (it) in pursuance of Sections 27 and 28 of

80 Chapter 88, Richmond City Code 1899 as amended, and that you (it) will be required to complete your (its) work within six months from this day," and that in compliance with said notice the defendant company submitted plans and details required to the Committee on Streets, who approved the same and thereupon proceeded with the construction of the works of its lines and conduits in pursuance of said Sections and completed the same within six months thereafter, and in compliance with said notification the defendant company submitted to the City Engineer said plans, etc., which were approved by W. E. Cutshaw, City Engineer, immediately after which said Company proceeded with and did the necessary work to place its wires in conduits in the underground territory.

7. That the two poles named in the summonses in this case are not owned by the defendant company, but are used by it for the support of its wires on the streets of the City and are respectively owned as stated in said summonses; that the pole first named in the warrant or summons has on it only wires of the owner and the Postal Telegraph-Cable Company, and that the second named pole has on it besides the wires of the owner, wires of the Postal Telegraph-Cable Company, Western Union Telegraph Company and Chesapeake and Potomac Telephone Company.

The pole first mentioned in said summons has upon it a cable containing about one hundred wires of the owner, the Telephone Company, one wire and also a cable of the Postal Telegraph-Cable Company, containing twenty wires, and four wires of the Fire Alarm System of the City. The second mentioned in said summons carries two attachments of its owner, the Virginia Railway and Power Company, three attachments of the Postal Telegraph-Cable Company, five attachments of the Western Union Telegraph Company, and four attachments of the Telephone Company.

8. It is agreed that there is no limitation specified by the ordinance, as to the number of wires placed upon a pole. In many instances a pole, although owned and used by one company only, has upon it twenty or thirty wires, as in the case of the Telephone Company. In other instances there are only two or three wires upon a pole, and these wires belong to different companies.

9. That the defendant company has not paid the fees as charged in the said summonses respectively and refuses so to do, though all other companies using the poles of other corporations in the City of Richmond, to-wit, the Western Union Telegraph Company, the Virginia Railway and Power Company, formerly the Richmond Passenger and Power Company, the Richmond Traction Company and the Virginia Electrical Railway and Development Company, and the Southern Bell Telephone and Telegraph Company, respectively, have all paid without contest or protest the fees for poles used by them, though not owned by them.

10. That the defendant company, from the year 1904 to the year 1911 inclusive, paid the fees upon poles used by it though not owned by it; a statement, showing the amounts and dates of which payments and the ownership of the poles on which the defendant company has paid the fees, is herewith filed marked "Agreed Facts—Exhibit No. 4," which is to be read and considered as a part of this statement as if the same were fully incorporated herein.

11. That Chapter 40, Richmond City Code 1910 concerning wires, poles, conduits, etc., in, over and under the streets of the City is, in its provisions, identical with Chapter 88 of Richmond City Code 1899, except by the addition thereto of Section 34 which is in the following language:

"34. None of the obligations, burdens and restrictions of this chapter shall, in any manner, interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the Act of Congress of July 21, 1866."

And except by the additions thereto of Sections 35 to 40 inclusive relating to the duty of persons operating electrical wires along the streets and alleys of the City of Richmond to take certain precautions and make certain constructions to prevent the electrolytic corrosion or damage to the gas and water mains of the City, a copy of which Chapter 40 of Richmond City Code 1910 is herewith filed marked "Agreed Facts—Exhibit No. 5," which is to be read and considered as a part of this statement as if the same were fully and completely copied herein.

12. That in January, 1911, thirteen poles belonging to the Postal Telegraph-Cable Company were used by other companies, of whom the City of Richmond claimed and collected a pole tax of \$2.00 for each pole so used.

13. That the Postal Telegraph-Cable Company for the year 1911 has paid the pole tax of \$2.00 per pole for each pole owned by it on which its wires are strung, but refuses to pay any tax on the poles of others used by it to support its wires, which poles of others so used are one hundred and twenty in number.

14. That the number of poles in the City owned and used in 1911 by the various companies for stringing electrical wires was about seven thousand four hundred and eighty-five (7,485) and that the aggregate tax charged thereon under the ordinance for 1911 was \$15,204.00.

15. That the Postal Telegraph-Cable Company for the year 1912 is charged with the following taxes to the City of Richmond:

License taxes for intrastate business	\$300.00
Property tax	44.77
Pole license tax fees charged on poles owned (192) and on poles used (123), total 315	630.00
Aggregate	\$974.77,

all of which has been paid or tendered to the City except \$246.00 on the one hundred and twenty-three (123) poles of other companies, among which are the two poles involved in this proceeding.

16. That Chapter 32, "Concerning the City Electric Light and Power Plant, the Committee on Electricity, City Electrician and the Examination and licensing of Electricians," Richmond City Code 1910, or any amendments thereof so far as the same relate to the duties of the officers and employees of the electrical department of the City of Richmond in making inspection of poles and wires shall be read in evidence and considered on the hearing of this case in the Hustings Court and in any appellate court considering an appeal from the judgment of the said Hustings Court, so far as copied in briefs of counsel.

17. That in addition to the inspection of poles, wires and other electrical appliances maintained in the City of Richmond in connection with the electrical department, by Section 14 of Chapter 40 made an Exhibit with this agreement, it is made the duty of the Chief of Police to require police captains of each police district to report to him on the last Monday in November of each year that they have examined each pole in their respective districts, used for the support of wires carrying electricity, whether any or all are in a safe condition, and under rules and regulations which the Board of Police Commissioners are authorized under the charter of the City of Richmond to prescribe, the whole police force required "to give inspection of poles their constant attention throughout the year to the end that accidents may be averted"; and the official reports of the police department for the year 1910 as to the poles belonging to the severa

companies, show that forty-three (43) poles were reported as defective; for the year 1911 that one hundred and eleven (111) poles were reported as defective, and that for the year 1912, eight (8) poles were reported as defective, and such reports were given to and filed with the Superintendent of the Fire Alarm and Police Telegraph.

18. That the printed record of the mandamus case hereinbefore referred to, together with the printed brief of counsel in said case, may be quoted in brief of counsel, read and relied upon in the Hustings Court or any appellate court to which the case may be taken as if the same were fully set forth herein.

19. That the streets and alleys of the City of Richmond are post roads under the Act of Congress on that subject.

So far as the decisions of the Supreme Court of this State now go, the City only owns the easement in the streets, while the fee is in the abutting owners. But this is not intended as an agreement as to a fact, since it is a question of law.

20. That in Section 19g of the Charter of the City of Richmond appears the following provisions:

"And in any action against the City to recover damages against it, for any negligence in the construction or maintenance of its streets, alleys or parks, where any person is liable with the City for such negligence, every such person shall be joined as defendant with the City in any action brought to recover damages for such negligence, and where there is a judgment or verdict against the City, as well as the other defendant, it shall be ascertained by either the Court or the jury, which of the defendants is primarily liable for the damages assessed."

21. That the Postal Telegraph-Cable Company is a corporation duly existing under the laws of the State of Delaware, and is engaged in the business of receiving, transmitting and delivering telegraphic messages.

22. That it has duly accepted the provisions of an Act of Congress adopted July 21, 1866, entitled, "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and Other purposes."

23. That said Company is engaged in interstate commerce, and also as a telegraph agency of the Government of the United States, and that the wires, poles (owned or used) and the equipment of said Company located in the City of Richmond are used in such occupation.

24. That the population of the City of Richmond, according to the United States Census of 1910 was 127,628.

25. That from the reports made by the several companies in January, 1913, to the City Engineer, under Section 9 of said Chapter 40, the following facts appear:

(a) That the Postal Telegraph-Cable Company owns in said city 192 poles, on which the ordinance imposes a tax against said Company of \$384.00

Said Company uses in said City—

99 poles of Va. Ry. & Power Co. on which
use the ordinance imposes a tax of . . . \$198.00

85

6 poles of Western Union Telegraph Co., on which use the ordinance imposes a tax of	12.00	
1 pole of Chesapeake & Ohio Ry. Co., on which use the ordinance imposes a tax of	2.00	
14 poles of Chesapeake & Potomac Telephone Company, on which use the ordinance imposes a tax of	28.00	
		<u>240.00</u>
		\$624.00

(b) The Western Union Telegraph Company
owns 58 poles in said City on which the
ordinance imposes a tax against said
Company of \$116.00

Said Company uses—

106 poles of Va. Ry. & Power Co., on which use the ordinance imposes a tax of . . .	\$212.00	
21 poles of Chesapeake & Potomac Telephone Co., on which the ordinance imposes a tax of	42.00	
12 poles of the City of Richmond, on which use the ordinance imposes a tax of . . .	24.00	
4 poles of the American Tobacco Co., on which use the ordinance imposes a tax of	8.00	
2 poles of Postal Telegraph-Cable Co., on which use the ordinance imposes a tax of	4.00	
		<u>290.00</u>
		\$406.00

(c) That Virginia Railway and Power Com-
pany owns in said City 3838 taxable
poles, on which the ordinance in ques-
tion imposes a tax against the said
Company of 7,676.00

Said Company uses in said City—

8 poles of Western Union Telegraph Company, on which use the ordinance imposes a tax of	\$16.00	
16 poles belonging to the City of Richmond, on which use the ordinance imposes a tax of	32.00	
17 poles of the Postal Telegraph-Cable Company, on which use the ordinance imposes a tax of	34.00	
26 poles of the Chesapeake & Potomac Telephone Company, on which use the ordinance imposes a tax of	52.00	
		<hr/> 134.00
		<hr/> \$7,810.00

d) That the Chesapeake & Potomac Telephone Company owns in said City 3625 poles, on which the ordinance imposes a tax against said Company of

\$7,250.00

Said Company uses in said City—

1 pole of Richmond and Henrico Railway Company on which the ordinance imposes a tax of	\$2.00	
7 poles of Va. Ry. & Power Co., on which the ordinance imposes a tax of	14.00	
2 poles of Western Union Telegraph Co., on which use the ordinance imposes a tax of	4.00	
28 poles of the City of Richmond, on which the ordinance imposes a tax of	42.00	
		<hr/> 62.00
		<hr/> \$7,312.00

(e) That the American Telephone and Telegraph Company owns 42 poles in the City of Richmond, on which the ordinance imposes a tax of

84.00

Which sums total \$16,236.00

if there be included the 120 poles of other companies used by the Postal Company.

26. That the City of Richmond for its Fire Alarm Telegraph System uses:

- 1757 poles of Chesapeake & Potomac Telephone Co.
- 270 poles of Va. Ry. & Power Company.
- 18 poles of Postal Telegraph-Cable Company.

And the said City uses for its Electric Plant Distribution System—
1989 poles of Virginia Railway & Power Company.

27. It is agreed that the money derived from the said taxes upon poles is not kept as a separate fund, but is paid in the Treasury of the City and becomes a part of the general funds of the City.

(Signed)

H. R. POLLARD, *City Attorney*.

POSTAL TEL.-CABLE COMPANY.

By MEREDITH & COCKE,
LEAKE & BUFORD.

87 Exhibit No. 1 with agreed facts omitted because made

Exhibit No. 1 with the Answer of the City of Richmond.

(The Petition of the City of Richmond, praying a writ of Mandamus and the Demurrer and Answer of the Postal Telegraph-Cable Company to the said petition, are not here copied because same are contained in the printed record of the case in the Supreme Court of Appeals of Virginia of the City of Richmond vs. Postal Telegraph-Cable Company, made Exhibit No. 3 with the Answer of the defendant herein.) Pages 1 & 45.

(*Exhibit No. 3, With Agreed Facts.*)

An agreement between the City of Richmond and the Postal Telegraph-Cable Company as to settling the controversy involved in the litigation between said parties now in the Supreme Court of Appeals of Virginia. The terms are, as follows:

1st. That the proceedings are, upon the motion of the said City and with the consent of the said Company, to be dismissed.

2nd. That no penalties or fines are to be claimed or enforced against the said company because of any acts of the company complained of in said proceedings, or for any similar acts done or omitted to be done since the said proceedings were instituted.

3rd. After said proceedings shall be dismissed as agreed, if the said City shall desire the said company to conform to the ordinance of the said City as amended since said proceedings were begun, due notice shall be given under said ordinance to file proper plans within two months after said notice, and to complete the work required within six months from such date.

4th. The order of dismissal shall allow to the said Company all costs in the Court of Appeals, except for the taking
88 before the Notaries of the evidence offered by the said company.

5th. A copy of this paper shall be filed with the Supreme Court as the basis of its decree order.

CITY OF RICHMOND.

By H. R. POLLARD, *City Atty.*

POSTAL TEL.-CABLE CO.,

By MEREDITH & COCKE.

A Copy.

Teste:

H. STEWART JONES, *Clerk*.

(Exhibit No. 4, With Agreed Facts.)

Office of Special Accountant,

Richmond, Va.

June 17th, 1913.

Mr. H. R. Pollard, City Attorney, — Building.

DEAR SIR: Complying with your request of this date, the following charges were assessed against companies owning or using poles of others in this City during year 1912, and amounts shown paid to the City as "Tax on Poles."

Company.	Poles owned and used.	Poles owned by company reporting.	Tax.
American Tel. & T. Co.	42	42	\$84.00
Western Union Tel. Co.	274	157	548.00
Postal Tel. & Cable Co.	192	192	384.00
Va. Ry. & Power Co.	3,284	3,284	6,568.00
So. Bell Telephone Co.	3,680	3,680	7,360.00
Richmond & Henrico Ry.	130	130	260.00
Total	7,602	7,485	\$15,204.00

89 The Postal Telegraph & Cable Co. have refused to pay tax for 1912 on 123 poles of others used, as required by ordinance.

Yours very respectfully,

GEO. S. CRENSHAW,
Special Accountant.

Copy.

Statement of Tax on Poles Paid by Postal Telegraph & Cable Co.
for Years Shown.

Date.	Year.		Poles.	Rate.	Amount.
5/28,	1904.	Poles Owned	94		
		Poles Used W. U. T. Tel. Co. .	4		
		" S. B. T. & " " ..	16		
			114	@ \$2.00	\$228.00
5/19,	1905.	Owmed	94		
		Used W. U. Tel. Co.	4		
		S. B. T. & T. "	16		
			114	@ 2.00	228.00

Date.	Year.		Poles.	Rate.	Amount.
5	1, 1903.	Owned	103		
		W. U. Tel. Co.	10		
			<hr/> 113	@ 2.00	226.00
3	27, 1907.	Owned	126		
		S. B. T. & T. Co. . .	1		
		Va. E. R. & D. Co. . .	1		
			<hr/> 128	@ 2.00	256.00
4	13, 1908.	Owned	126		
		R. Trac. Co.	2		
			<hr/> 128	@ 2.00	256.00
3	25, 1909.	Owned	126		
		Va. E. R. & D. Co. . .	5		
		R. T. Co.	2		
		R. P. & P. Co.	12		
			<hr/> 145	@ 2.00	290.00
4	19, 1910.	Owned	123		
		R. P. & P. Co.	32		
		Va. E. R. & D. Co. . .	6		
		*S. B. T. & T. Co. . .	11		
			<hr/> 172	@ 2.00	344.00
4	4, 1911.	Owned	123		
		R. P. & P. Co.	32		
		Va. E. R. & D. Co. . .	6		
		S. B. T. & T. Co. . .	11		
			<hr/> 172	@ 2.00	344.00
5	4, 1912.	Owned	192		
		Others	123		
			<hr/> 315	@ 2.00	384.00
90					
	1913.	Owned	192		
		Others	120		
			<hr/> 312	@ 2.00	

*Corrected on request of Postal Telegraph & Cable Co. from 22 to 11.

Correct:

GEO. S. CRENSHAW,
Special Accountant.

For year 1910 Company paid to J. W. Bronaugh, Deputy Treas. \$144.00 and for 1911 to same party \$138.00 for poles owned and used in So. Richmond. (Formerly Manchester.)

Copy.

Office of Special Accountant,

Richmond, Va.

June 9, 1913.

Mr. H. R. Pollard, City Attorney, — Building.

DEAR SIR: Herewith I hand you statement of taxes on Poles paid by the Postal Telegraph & Cable Co. for the years shown. If there is further information that I can furnish, I shall be glad to do so.

Yours very respectfully,

GEO. S. CRENSHAW,

Special Accountant.

Copy.

(Exhibit No. 5 with Agreed Facts is not copied because the same being Chapter 40 of Richmond City Code 1910 is made Exhibit No. 2 with the Answer of the defendant herein.)

91 *Stipulation as to Evidence of Theodore L. Cuyler, Jr.*

VIRGINIA:

In the Hustings Court of the City of Richmond.

CITY OF RICHMOND

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

It is stipulated and agreed between the parties to this proceeding that the annexed statement of Theodore L. Cuyler Jr., Assistant Treasurer of the Postal Telegraph-Cable Company, may be used in evidence, if legal testimony, upon the trial in lieu of his being introduced as a witness or of having his deposition taken. But the consent of the City of Richmond only goes to the form of the evidence, it reserving the right to object to such evidence upon the ground that it, whether given before the court or as a deposition, is illegal, irrelevant and incompetent.

	CITY OF RICHMOND,
(Signed)	By H. R. POLLARD, <i>City Attorney.</i>
	POSTAL TELEGRAPH-CABLE
	COMPANY,
(Signed)	By MEREDITH & COCKE,
	LEAKE & BUFORD.

In the Hustings Court of the City of Richmond.

CITY OF RICHMOND, Plaintiff,

against

POSTAL TELEGRAPH-CABLE CO., Defendant.

I, Theodore L. Cuyler Jr., Assistant Treasurer of the above named defendant, hereby affirm that the entire receipts of the above named defendant for the year 1911 in the City of Richmond, Virginia, (after paying connecting Telephone, Telegraph or Cable Companies for such part of such receipts as they were entitled to),
 92 were as follows, namely, the receipts from telegrams from Richmond to other points in Virginia were \$5,958.89, and the receipts on telegrams from Richmond to points outside of Virginia were \$26,859.44, thus making the entire receipts \$32,818.32.

The total expense of operating and maintaining the office in Richmond for 1911 was \$25,972.70, without including interest on investment or depreciation or dividends or license fees paid or claimed by said city, and without including any part of what is known as overhead expense, namely, superintendence, general management, local expense, or local or state or federal taxes.

The interstate receipts were .18157% of the entire intrastate and interstate receipts. This .18157% of the entire office expense at Richmond in 1911 namely, \$25,972.70 gives \$4,715.86 as the proper expense apportionable to the intrastate expense at Richmond in 1911, and deducting this from the entire intrastate receipts, \$5,958.89 leaves \$1,243.03.

As to the overhead expense (not including in any instance interest on the investment or dividends) mentioned above, the entire overhead expense of the defendant in all of the States in which it operates, including Virginia in 1911, was \$284,433.51, and the entire receipts of the defendant in those States were \$1,215,777.64 the overhead expense thus being .23395% of the entire gross receipts. This .23395% of the intrastate receipts at Richmond in 1911 (\$5,958.89) amounted to \$1394.08 as the overhead expense to be applied to the intrastate expense at Richmond. Deducting this \$1,394.08 from the balance mentioned above, \$1,243.03, leaves a deficit of \$151.05.

There is still to be considered the taxes. In 1911 the defendant paid \$1476.62 as a state license fee in the State of Virginia for the privilege of doing business in Virginia. Assuming that this state license fee applied only to intrastate business (by reason of
 93 its being illegal, if construed as applicable to interstate business) the proportion applicable to the intrastate business in Richmond \$452.73. This is arrived at by comparing the Richmond intrastate business (\$5,958.89) with the entire intrastate business in Virginia (\$19,435.49); in other words .3066% of the state license fee (\$1476.05) making \$452.73. This increases the deficit by that amount. The defendant also paid a city tax in Richmond

on its tangible property in 1911, amounting to \$46.77, and it paid a tax to Henrico County of \$13.13.

Depreciation is also to be considered. The defendant's property in Richmond has a value of \$14,200.00 based on original cost. Depreciation should properly be figured at 10%, ten years being the average life of a telegraph line, if repairs, partial reconstruction and total reconstruction be considered. This 10% would be \$1420.00 a year, to be divided between interstate and intrastate. The intrastate at Richmond is .18157% of the total business. Applying this to depreciation would give \$257.82 as the depreciation applicable to the intrastate receipts at Richmond.

Finally, there is a license fee which the defendant has paid, namely \$300.00 fixed amount and \$2.00 per pole on 192 poles, making \$684.00.

Summarizing the above the following is the result:

Intra-state receipts	\$5,958.89	
Intra-state expense		\$4,715.85
Intra-state overhead expense.....		1,394.08
Proportion of State license fee.....		452.73
Specific and pole license.....		684.00
Depreciation		684.00
	<u>\$5,958.89</u>	<u>\$7,504.49</u>

The above summary shows a deficit for 1911 of \$1545.60. This deficit would be increased by \$240 if defendant has to pay a license fee on poles belonging to other companies, on which the defendant has strung one or more wires.

The above entitled suit involves the year 1911 only. That year was an average year, as is shown by the same method of figuring for the year 1912. Adopting the same method of figuring for 1912 as is given above for 1911, the summary would be as follows:

Intra-state receipts	\$5,610.49	
Intra-state expense		\$4,551.63
Intra-state overhead expense.....		1,261.23
Proportion of State license fee.....		476.56
Depreciation		245.31
Specific pole license.....		684.00
	<u>\$5,610.49</u>	<u>\$7,218.73</u>

The above summary shows a deficit for 1912 of \$1,608.24. This deficit would be increased by \$240 if defendant has to pay a license fee on poles belonging to other companies, on which the defendant has strung one or more wires.

STATE OF NEW YORK,
County of New York, ss:

Theodore L. Cuyler, Jr., being duly sworn, deposes and says that he is Assistant Treasurer of the Postal Telegraph-Cable Company, the corporation above named, and that he has read the foregoing affidavit and knows the contents thereof and that the same is true to his own knowledge.

THEODORE L. CUYLER, Jr.

Sworn to before me this 7th day of August, 1913.
[SEAL.] HENRY A. VAN DER PAAUWERT,
Notary Public, Kings County, No. 29.

Certificate filed in N. Y. Co. No. 4.

Hustings Court of the City of Richmond, October 11th, 1913.

CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY.

Evidence for the Plaintiff.

95 WILLIAM H. THOMPSON was duly sworn, and testified as follows:

Direct examination.

By Mr. Pollard:

Q. Mr. Thompson, what position do you hold under the City Government?

A. I am known as City Electrician.

Q. How long have you held that position?

A. About twenty-five years.

Q. Are you not also Superintendent of the Fire Alarm and Police Telegraph?

A. Yes, sir.

Q. You hold both positions; how long have you held those positions?

A. Superintendent of Fire Alarm, ever since I have been in office, I was elected in 1888; City Electrician since the position was created.

Q. What training and experience have you had for the discharge of the duties of that position?

A. I have been with the City from the birth of the electrical business up to the present time. My experience has been local here, practically, in the city of Richmond, I have grown up with it from the planting of the first telegraph pole until the present time.

Q. Have you studied the use of electricity and the proper appliances for its operation and application?

A. Well, I have been at work at that all the time, more or less.

Q. What position have you held with the Association of Electricians and Engineers?

A. I am Past-President of the Association of Municipal Electricians; I have been an officer in that Association for possibly ten or twelve years, holding various positions.

Q. At what time and where were you elected President of that Association?

A. I was elected in the city of Richmond at the Convention here

96 Q. In what year?

A. I can't recall the year exactly.

Q. Of what did the delegates to that convention consist.

A. Mostly electricians employed by cities, city officers.

Q. Throughout the country, or any State?

A. Throughout the country.

Q. Was that convention which elected you well attended?

A. Yes, sir, pretty well attended.

Q. Will you state to His Honor as near as you can what are your duties as Electrical Inspector, and as also as Superintendent of Fire Alarm and Police Telegraph, with reference to the maintenance of poles on the streets of the City of Richmond, parks and other public places.

A. Poles come under our inspection, and when complaint is made to the Department by the police officers, or our inspectors, or citizens, I send a competent man to inspect the pole. In other words, it is the City Engineer's duty to erect the pole, and our duty to see whether it is properly put down, or not, from the time the pole is planted in the ground, supervise the erection and watch it and see what goes on it and all.

Q. Can you give His Honor a memorandum showing the expense of maintaining of those two departments under your supervision?

A. Yes, sir, I have a memorandum here.

Said paper is here introduced as evidence and reads as follows:

Memorandum Showing Cost of Operation of Electrical Inspection Department of the City of Richmond.

Two Electrical Inspectors at \$1,500.00 each per annum . .	\$3,000.00
City Electrician and Superintendent Fire Alarm and Police Telegraph	2,684.50
Maintenance of the Department, including office rent, stationery, janitor service, automobile repairs, etc. . . .	1,500.00
	<hr/>
	\$7,184.50

97 In addition sections 14 and 15 of Chapter 40 of Richmond City Code 1910 require the Superintendent of Fire Alarm

and Police Telegraph to look after inspection of Poles and Wires. In his Department there are the following costs and expenses incurred in the matter of inspecting the location, installation and maintenance of electrical works and wires:

One Assistant Superintendent at	\$1,449.00 per annum	..	\$1,449.00
3 Inspectors and Operators	" 1,209.60 "	..	3,628.80
1 Lineman	" 1,102.50 "	..	1,102.50
1 Lineman	" 945.00 "	..	945.00
1 Lineman	" 900.00 "	..	900.00
Teams, Office rent, stationery, automobile,			
repairs for same and maintenance	" "	..	1,500.00
			<hr/>
			\$9,525.30

One of the Fire Alarm Inspectors in addition to his regular duties, does clerical work and helps the inspectors in the Electrical Inspection Department. The total cost as above shown is therefore \$16,709.80.

Q. Does that paper correctly state the situation?

A. Yes, sir, those figures are fixed by ordinance.

Q. Is the present force of your office, which this memorandum shows is maintained at an aggregate expense to the city of \$16,709.80—is that correct?

A. That is correct; it is fixed by ordinance.

Q. Is, in your judgment, the present equipment of the department adequate to do completely the work?

Mr. Meredith: I object to the question and answer, on the ground that it will appear from the exhibit filed with the stipulation of facts that the duties of his office are not confined to the examination of poles of other people, but that they are very extensive, and the ordinance shows exactly what he has to do.

A. The work of inspecting poles, or the general work of the Department?

By Mr. Pollard:

98 Q. Both.

A. No, sir.

Q. The specific work of inspecting poles, can you, with the force under your control, in your judgment, adequately inspect poles?

A. No, sir, I cannot.

Q. What relief ought to be given?

Mr. Meredith: All these questions are objected to.

A. We need more inspectors.

By Mr. Pollard:

Q. What cost would that represent?

A. Somewhere in the neighborhood of \$1,500.

Q. Has the City in the last five years greatly enlarged and grown, especially in the matter of the application of electrical machinery and electric lighting and electric heating?

A. Yes, sir, the progress has been wonderful, and our Department has grown with it; year after year we have added to the inspectors.

Q. How long has it been since you added any force?

A. Our last man was put on about three years ago, I think.

Q. Are others now needed by reason of the growth of the City?

A. Yes, sir, absolutely.

Q. How many additional inspectors should there be?

A. Adding one inspector—I forget what they are paying them now, about \$1,500. We would have to have about a couple.

Q. You think there would have to be two at \$1,500?

A. Yes, sir, \$1,500, for the two.

Q. You mean you pay them \$750 apiece?

A. That is what we start in at, \$750 a year.

Cross-examination.

By Mr. Meredith:

Q. Mr. Thompson, am I correct in understanding, from the paper that you filed, that the total sum of \$16,709.80 represents the entire expense for your Department?

A. Yes, sir.

99 Q. And your Department embraces the salaries of the two Departments you mentioned, one is the Fire Alarm and Police Telegraph, and the other is——

A. Electrical inspection.

Q. I wish you would tell us the respective duties of both Departments.

A. The duties of the Fire Alarm and Police Telegraph Department is that men are employed to inspect the outside wire and pole construction. In fact, the fire alarm people and the police people are the only officers that control the outside construction. It is a matter of fact that we must not wait until trouble happens, but be on the alert by systematic inspection day after day to maintain the service, the overhead construction, poles, things of that kind. The other Department is more concerned with interior construction, the inspection of wires that go into houses, such things as call-boxes, electric clocks, electric equipment, running wires in houses and wiring in general; my duty is to supervise that inspection in that way, see that it is carried out.

Q. I asked you to tell me the duties of your two departments; have you told them in full?

A. Not in full, of course.

Q. I don't mean every little detail, but have you given a fair general statement of the duties of your office?

A. The duties of the office, yes, sir.

Q. You have in one department two electrical inspectors at \$1,500 per annum; which department is that?

A. The interior inspection department; they inspect wires after they leave the poles and touch the buildings.

Q. They are confined entirely to that?

A. Not entirely. They may be detailed to attend to pole construction work.

Q. Have you ever done that?

A. Yes, sir. The best two men I have are those two inspectors.

Q. You say that you have detailed those two men to do
100 that; I want a memorandum showing every time you have sent one of those men to inspect a pole; you have a record of that?

A. Not every inspection of a pole.

Q. I mean when you send men out to inspect poles.

A. General inspection of poles, no, sir; that is done by the Police Department once a year.

Q. And your men go around and inspect poles that have been reported?

A. Yes, sir.

Q. And that is the extent of your inspection?

A. With the exception that the men are on the alert and see them, and some of the people see them traveling about.

Q. There is no general inspection, and no annual inspection, but you depend upon what reports come from the Police Department and also what reports come from your men as they go around attending to any duty, and they keep their eyes open and report what defective poles they see?

A. Yes, sir; they have got to see it, they have got to do it; the City uses those poles with them.

Q. The City does not own any poles, does it?

A. It has some of her own between regular lines.

Q. Does anything in connection with the City Electrical Plant come under your department?

A. No, sir.

Q. You have nothing to do with those poles?

A. No, sir.

Q. Those are owned by the City and come under Mr. Trafford's supervision, do they?

A. Yes, sir.

Q. A good deal of the duty of your inspectors, I suppose, is looking after the wires of the Fire Alarm and Police Telegraph Department; that is a good deal of the duty, especially of these men who are spoken of here in the latter part of your list, is it?

A. Yes, sir.

101 Q. That requires them to see whether your wires are in condition, whether your cross-arms are in condition, and the connections and all of that kind are in proper condition for the use of the Fire Alarm and Police Telegraph?

A. Yes, sir; and in doing that they cover the inspection of pole also; they are bound to go over the ground, they see them.

Q. A lineman is a man who puts up poles and wires, is he?

A. Yes, sir.

Q. And the total expenses of your department, salary, expenses, and your teams and office rent and stationery and automobile, which you have given in here, amount to \$16,709.80; that is everything, for all of your duties, for your own wires and your own poles?

A. Yes, sir, that is the inspection department proper.

Q. And it is also the duty of these men to see whether a wire goes into a house properly?

A. Yes, sir.

Q. And they go into a house and see whether the wires are safely run, do they?

A. Yes, sir.

Q. Is it not a part of their duty, every time a new house is built, to see that the electric wires are properly put in so as to be safe?

A. Yes, sir.

Q. And then, when any changes are made in the interior of a house—

A. They are busy in interior work, but you can rely on the fire alarm inspectors to see that all the poles are in proper condition; they are bound to do it, if they did not, we would be down in the street.

Mr. Meredith: I object to that answer.

Q. Mr. Thompson, your duties are pretty well prescribed by Chapter 32 of the City Code of 1910, are they not?

A. I don't know, sir; there is so much in there about the
102 duties in various sections.

Q. This Chapter is: "Concerning the City Electric Light and Power Plant, the Committee on Electricity, City Electrician, and the Examination and Licensing of Electricians," and so on. Your title is City Electrician, is it?

A. Yes, sir, that will cover it.

Q. Your duties, as covered by the seventh clause of Chapter 32 of the Richmond City Code of 1910, are:

"That the Committee on Electricity shall as soon as practicable after July 1, 1909, and biennially thereafter, appoint two Electrical Inspectors whose duty it shall be, under the direction of the City Electrician, to inspect electrical wiring inside of and outside of buildings, and also to perform such other duties pertaining to the Department of Electricity as may be required of them respectively by the City Electrician or the Committee on Electricity."

That is the electrical department; that is the people you spoke of for inside work?

A. Yes, sir.

Q. Clause eleven reads as follows:

(NOTE: The following clause of Chapter 32 is the one which is referred to in the stipulation of agreed facts.)

It shall be the duty of the Electrician of the City to look after and keep in repair and proper condition all electrical apparatus owned and controlled by the City, and shall inspect all overhead street-construction poles, brackets, cross-arms, and all connections inside or outside with buildings, test the candlepower of any and all electric lights furnished by contract to the City, and such other electrical work as may be required of him by the Committee on Electricity; he shall keep a faithful record of all applications to string wires in streets or houses, whether approved or rejected, and shall immediately inspect all new work and report the same to the Committee.

All of these duties come under your Department, do they?

A. Yes, sir.

Q. Then the next section intended to be covered by this stipulation of agreed facts provides that it shall be unlawful for any corporation, firm or individual, to string wires or make any electrical connection with buildings within the corporate limits of the City of Richmond without permission to do the same from the
103 Electrician of the City, subject to the approval of the Committee on Electricity; and you supervise that. Then Section twenty-two reads, "On any pole of any electric light, power, street railway, telephone or telegraph company used jointly by two or more such companies, each company shall be allotted a special zone and shall confine its wires to that zone." And you fix that zone, and you have the top arm?

A. Yes, sir, the top part of the pole.

Q. And you have given as fairly as you can what are the duties of your Department and the character of the inspection you make, have you?

A. In a general way, yes, sir.

By Mr. Pollard:

Q. Does the Postal Telegraph Cable Company operate call wires in connection with their business?

A. Yes, sir.

Q. What is a call wire?

A. The telegraph company runs out a line of wires through the commercial district and puts these little call boxes on them to call messenger boys to send messages back to the company's office.

Q. Where are the call wires?

A. Most of them are in the underground district, but they are not under ground.

Q. Where are they strung, on what?

A. On house-tops and poles.

Mr. Meredith: I object to this line of examination, because it has no reference to the question before us.

By Mr. Pollard:

Q. When they are on poles, where are they?

A. Iron poles and wooden poles owned by various companies.

Q. In the streets?

A. In the streets, yes, sir.

104 Q. Is it important, for safety against fire risks and conflagrations, that those wires should be inspected as well as other wires?

Mr. Meredith: I note the same objection to all this line of examination.

A. Yes, sir, more so.

By Mr. Pollard:

Q. Do you inspect them?

A. Yes, sir, rigidly.

Q. How about the conduits, is there any reason for inspecting them?

A. No, sir, they are down under the ground and take care of themselves.

Q. Do you inspect the installation of the conduits?

A. Yes, sir, we have to watch that when they are first put down.

Q. Your department has to watch and supervise that?

A. Yes, sir, the putting down of conduits, that comes under me.

Q. How do you inspect the wires that are on house-tops; that is, by what means do you reach them for that purpose?

A. We go on the fire-escapes and roofs and follow up the wires and see if they are in proper shape and enter the buildings all right.

Q. Is it important that they should be inspected?

A. More so on the house-tops because they must be high enough to be out of the way of a fireman's head on the roof, and they are required by ordinance to get a separate permit for every wire that goes on buildings; and frequently I see linemen working up there and I follow them and go everywhere they go.

Q. You not only inspect them after they have been erected, but you supervise their erection?

Mr. Meredith: I object to that as plainly leading.

A. Yes, sir.

By Mr. Pollard:

Q. What situation of wires exists after a sleet storm in the city, and what does an occasion of that kind necessitate?

Mr. Meredith: I object to that also.

105 A. It requires a general inspection of all poles and wires in the city to see that they are perfectly safe and not down.

By Mr. Pollard:

Q. Do you do that after every storm?

A. Yes, sir, high winds and storms.

Q. Why is it necessary to do that?

A. Because wires have no way of giving warning that they are

down unless somebody goes and sees whether they are all right, and they are liable to cause trouble when you want to use them.

Q. Cause trouble in what way?

A. Being out of commission, down in the street, and broken. We have what we call open-circuit wires and closed-circuit wires.

Q. Is there any danger from high-current wires, by wires falling on them?

A. Yes, sir.

Q. Is that true of telegraph wires as of others?

A. Telegraph wires are as dangerous as any others.

Q. If they cross and come in contact with high-power wires during a storm?

A. Yes, sir.

Q. Has there been any loss of life here by means of a telegraph wire conveying a high current coming in contact with a fireman?

Mr. Meredith: I object to that.

Q. Yes, sir, we have had that to contend with.

By Mr. Pollard:

Q. Has it actually happened?

A. Yes, sir.

Q. Was it a telegraph wire?

A. Yes, sir, a telegraph wire in conjunction with a high-current wire.

Q. Falling over a high-current wire, do you mean?

A. Yes, sir.

Q. And one of the firemen lost his life?

A. Yes, sir.

106 Q. About how long ago was that?

A. I cannot give you the exact date, but possibly five or six years ago.

By Mr. Meredith:

Q. You said just now that after a sleet and wind-storm you went around and examined every pole. Did you mean to say that?

A. No, sir, and I didn't say that, either.

Q. You did not mean to say that, did you?

A. No, sir.

Q. What you mean is that after a severe wind-storm or a severe sleet-storm, your men go around and go about the city looking after your own wires, and your own attachments, and also, as they go along they look to see whether the poles are out of place; is that right?

A. Other people's poles and wires.

Q. As they go along?

A. Yes, sir.

Witness stood aside.

NOTE.—The statement of agreed facts is here read in evidence.

Mr. Pollard: I want to object, as incompetent and irrelevant, to clause seven in the statement of agreed facts; also to clause eight, clause twelve, clause twenty, clause twenty-five, clause twenty-six and twenty-seven. We can avail ourselves of these objections hereafter. Your Honor can withhold ruling for the present, and when your ruling is finally given we will save the point.

Mr. Meredith: We object to clause four of the statement of agreed facts, as irrelevant and immaterial, and claim that it should not be allowed as evidence. Under the right reserved we further object to clause five, we also make objection to clause six, on the ground
107 that both of those sections are irrelevant and immaterial. We also object to clause nine.

Plaintiff rests.

Evidence for the Defendant.

W. H. JOYNES, was duly sworn, and testified as follows:

Direct examination.

By Mr. Meredith:

Q. Will you please state your name, age and occupation?

A. W. H. Joynes, Chief of the Fire Department, age fifty-seven.

Q. How long have you been in the Fire Department?

A. Thirty-two years.

Q. How long have you been chief?

A. About four years.

Q. Were you Assistant Chief before that?

A. Yes, sir.

Q. How long?

A. About two years.

Q. Were you Captain in the force prior to that?

A. About twelve or fourteen years.

Q. I want to ask whether your Department makes anything like a regular inspection of poles that carry electric wires in the city of Richmond, or how do you manage it?

A. We do not make a general inspection. The inspectors, or officers, or any member of the department who finds a defective pole, reports it to the office, and we report it to the office of the Fire Alarm Department. We do not pass on those poles at all, and it is only a matter with us whether we can use them in climbing. I have

108 seen a good many of those poles that looked pretty decayed,

but they were rather solid when they took them up, and they decay didn't amount to anything. I don't know how we would start out to inspect them unless we had an expert man to climb them and report on their condition. We do not come in contact with the inspection.

Q. Have you got inspectors in your department?

A. We inspect buildings and so forth, and in passing through town, if they see a pole they think is dangerous, or if we, the officers, see

one that we think is dangerous, we report it to the Fire Alarm Department.

Q. And that is the extent of your inspection?

A. Yes, sir.

Cross-examination.

By Mr. Pollard:

Q. Did you ever report a pole?

A. Yes, sir, I have reported several. I don't remember where they were now, it has been some time.

Q. You spoke of the impracticability of an unskilled man determining whether a pole was sound or not. Do you think it is advisable to have an inspector in your department that would be skilled in that matter?

Mr. Meredith: I object to that question.

A. We don't use the poles at all except for climbing. I think the inspectors ought to be in Mr. Thompson's department.

By Mr. Pollard:

Q. Suppose Mr. Thompson didn't have them at all, it would be desirable to have them in your department to inspect poles, would it?

Mr. Meredith: I note an exception.

A. Yes, sir, I think so.

By Mr. Pollard:

Q. Is it not important to the Fire Department that the poles should be sound and safe?

109 Mr. Meredith: Same objection.

A. Yes, sir, I should think so; they ought to be.

By Mr. Pollard:

Q. Do you know of any other way of having them safe except by having them thoroughly inspected?

A. No, I do not, unless the wires were taken off the poles altogether.

Q. You know we have an underground territory and some that is not underground territory. Those outside of the underground territory, it is important that they should be thoroughly inspected, is it?

A. I should think so, yes, sir.

Witness stood aside.

Mr. Meredith: The defendant pleads not guilty to the extent stated in the specifications to be filed with the order of Court.

I introduce the statement of Mr. Theodore L. Cuyler.

Mr. Pollard: I object to the whole, and to each and every state-

ment made by the witness Theodore L. Cuyler in his testimony, on the ground that it is irrelevant and incompetent evidence in this case.

Said statement reads as follows:

(Here insert.)

GEORGE THOMAS HUTT was duly sworn, and testified as follows:

Direct examination.

By Mr. Meredith:

Q. Please state your name and occupation.

A. George Thomas Hutt, lineman for the Postal Telegraph-Cable Company, Richmond, Virginia.

110 Q. How long have you been with the Postal Telegraph Cable Company?

A. Fifteen years.

Q. Are you Chief Lineman of the Company?

A. Yes, sir.

Q. What are your duties?

A. My duties are to repair the lines, look after all repairs in this section.

Q. You put up wires whenever it is necessary, and poles, and so on, do you?

A. Yes, sir.

Q. The Postal Telegraph Cable Company has underground cables hasn't it, from its office to north of Broad Street?

A. Conduits, yes, sir.

Q. And then it makes connection with the overhead wires?

A. We have an overhead cable from north of Broad to Turpin, and then we have open wires not in cables. Then we have an underground cable from our office to the north side of Canal street, and then overhead cable to Manchester.

Q. About how often do you go over your lines?

A. We see our lines two or three times a month, sometimes oftener than that, in the city.

Q. Do you make anything of an observation or inspection as you go along?

A. Oh, yes, sir, as we go along we remedy it.

Q. Do you use proper material or improper material?

A. Proper material.

Q. Do you keep an eye on whether it is in proper condition, or not?

A. Yes, sir.

Q. And you do this how often?

A. Sometimes three or four times a month, and we can see them most any time.

111 Q. If you see a pole in danger, or out of the perpendicular, what do you do.

A. We look at it, and if it is possible we re-set it, and if not, we put a new pole in place of it. Often poles are blown out of line by the wind and can be re-set.

Q. What character of poles have you from here out to Turpin Street?

A. We have juniper poles out to Turpin street, and the other side of that we have chestnut poles.

Q. Is your inspection confined to the city?

A. No, sir, we go out of the city on inspection.

Q. Do your duties carry you out of the city?

A. Yes, sir. I see the wires and poles inside the city a great deal oftener than I do those outside.

Q. Suppose there is a severe wind-storm or a severe sleet-storm, what do you do?

A. If a wire is in trouble we go after it; if it is not, we don't go after it.

Q. Can you tell that from the service you get from your lines?

A. Yes, sir, we can tell that in the office from the service we get from the wires.

Mr. Pollard: All of this evidence is irrelevant and we move to strike it out, from the fact that if the defendant company inspects its poles, it cannot possibly substitute that for inspection by the City.

Mr. Meredith: The cases hold that this line of testimony is proper, upon the ground that the company has the right to show that it makes proper inspection and uses proper instrumentalities so as to minimise any chance of danger.

Witness stood aside.

112 LOUIS WERNER was duly sworn, and testified as follows:

Direct examination.

By Mr. Meredith:

Q. Please state your full name, age and occupation.

A. Louis Werner, age fifty-eight, Chief of Police of the City of Richmond.

Q. How long have you been Chief of Police?

A. Nine years.

Q. Were you in the police department before that?

A. Yes, sir.

Q. What was your position then?

A. Prior to being chief I was sergeant for nine months, and prior to that I was a patrolman.

Q. You were not a captain?

A. No, sir.

Q. But you were a sergeant nine years ago, and then you were elected chief and you have been so ever since?

A. Yes.

Q. There is an ordinance requiring the captains of the police department once a year to go around and make an examination of the poles and make a report. I want to ask you whether that is ever done.

A. Yes, sir.

Q. Do you testify to His Honor that each year the captains in our department make a specific tour to find out the bad poles?

A. Yes, sir.

Q. Didn't you tell me that they didn't do it?

A. No, sir.

Q. Give me any report made by any captain.

A. The report comes to me and goes to the Superintendent of the Telegraph Department.

Q. I want you to give me any report made by any captain of any annual tour.

A. Yes, sir. I don't know that I have a copy; if I haven't you can get it upstairs.

Q. Does not your department make a printed report every year?

A. Yes, sir.

Q. Don't you show there how many poles are reported?

A. Yes, sir.

Q. Don't you know that those reports are made up from time to time from reports that come in from the privates or anybody that sees them?

A. Yes, sir. You misunderstood me. I told you once a year we make our annual report. We don't stop at that. We make a report of every pole that is reported. I misunderstood you if that was your question. I told you once a year, but we wouldn't wait for that, we would report a pole if a policeman came across it.

Q. I ask if you have in your office a single report of an annual inspection made by a captain?

A. Yes, sir.

Q. Can you get that?

A. I think so.

Q. I will ask you to get that? How many captains have you?

A. Three district captains.

Q. How long does it take your captains to make an annual examination of all the poles in town?

A. Well, I don't know; about a week.

Q. Do you mean that the Captains take a week every year for that purpose?

A. The man on the beat is instructed to report all that kind of thing.

Q. I asked you whether your captains devoted a week to the inspection of poles.

A. I reckon they do. I have done it time and again as a patrolman and sergeant?

114 The Court: He is asking whether the captains personally make the inspection.

Witness: No, they don't do that; they instruct their men.

By Mr. Meredith:

Q. Have they their instructions to do that from the Police Board?

A. They have them from me.

Q. And the captains personally do not make the inspections?

A. No, sir.

Q. Then I did understand you correctly that the captains do not personally make the inspection, but they instruct the men to watch out for poles?

A. Yes, sir. Once a year is a general inspection of poles.

Q. Do you mean that the privates inspect them once a year, or that every time they see them they look out for them?

A. They get orders once a year. They make a special inspection in the month of November every year.

Q. Who does that?

A. Instructions to captains and they instruct the men on the beats.

Q. Do those privates make reports?

A. Yes, sir, they report to the office and we forward it.

Q. Don't you know that is done all the year round and not once a year?

A. We give instructions once a year. Six weeks ago a captain went around and found a defective pole; a man would do that no matter when he found it.

Q. How many are there on the force?

A. 163 all told.

Q. How many are in active service?

A. You mean beatmen?

Q. Yes.

A. About 116, something like that.

115 Q. In 1912 eight poles were reported as defective?

A. Yes, sir.

Q. There would be reports from the balance if they found no defective poles?

A. No, they would not report if they didn't find them; they just report when they find them.

Q. Don't you know that those eight came in at different times during the year?

A. I don't know.

Q. Isn't that the way they came in?

A. A general order is sent out in November, I think it is the last Monday in November, and the captains give instructions and tell their men to examine all poles in the city of Richmond.

Q. And that is the extent of it?

A. Yes, sir.

Q. And they do that all the year round?

A. They don't examine them all the year round.

Q. Don't they do exactly the same thing all the year?

A. I want you to understand me. When any policeman comes across a defective pole at any time of the year he reports it.

Q. I am asking you whether each day in the year they do not keep their eyes open to see a defective pole, and if that is not all they do.

A. I can't say so. If they see a defective pole they report it.

Q. You don't mean that you send fifty or twenty-five men out to look for defective poles, do you?

A. They get their instructions once a year.

Q. They get instructions once a year, and they do that all the year round; you know that.

A. If they see a defective pole they report it.

Q. And don't you know that there is no particular day set aside to inspect, but that they get orders once a year?

A. A special day once a year is set aside for that.

Q. The whole force set aside a day to inspect?

116 A. No, they can't do that. The last Monday in November they are instructed to do that.

Q. Instructions to the men for the whole year?

A. Of course.

Q. Don't you know that they don't make an inspection on any particular day?

A. They give the order that day to report any pole out of order, and if they see a bad pole any day they report it.

Q. Don't you know that they don't make any inspection on any particular day, but that they just walk around and notice them?

A. No, sir, they examine them; that's the way I used to do.

Q. How?

A. Hit them with my stick; walk around the pole and see if any part of the pole is rotten.

Q. Do you mean to say that on any day in the year the whole force is engaged in that thing?

A. Yes, sir.

Q. Is there any report of that?

A. Yes, sir, I will see if they are there.

Q. I don't mean whether reports are made from time to time that poles are defective, but is there any annual report brought in by the men to the captains, and made by the captains to you, as the law requires, in November?

A. Yes, sir. I will see if I can find any.

Q. I want them all. I don't want to misrepresent you, but I want to understand you. Do I understand you to say that sometime in November your force is instructed to keep an eye open for all defective poles?

A. Yes, sir, go and examine them.

Q. Let me understand you—that you give them specific instructions that on a certain day they shall examine them?

A. Yes, sir.

Q. Is that instruction given in writing?

117 A. Sometimes in writing; I meet the captains every morning, and sometimes I put it in writing and sometimes I put it on the bulletin and sometimes it is verbal.

Q. I want any report you have, made under these circumstances.

A. If we have got them.

Q. That report comes from the force and is made to the captain?

A. Yes, sir.

Q. And the captain would send them to you?

A. Yes, sir, and we send them upstairs.

By Mr. Pollard:

Q. I find in the paper made an exhibit in this case, Chapter 40 of the Richmond City Code, section 14, the following:

14. It shall be the duty of the chief of police to require the police captains of each police district to report to him on the last Monday in November of each year that they have had examined each pole in their respective districts used for the support of wires carrying electricity, and whether any or all are in a safe condition. The said chief of police shall, upon receipt of such reports, forward the same to the superintendent of fire-alarm and police telegraph, who shall require the person or company owning any such pole reported to be unsafe, and deemed by the said superintendent to be unsafe, to remove the same. Any such person or company who, after being so notified, shall fail to have the same removed within forty-eight hours after being so notified shall be liable to a fine of not less than ten nor more than fifty dollars; each day's failure as to each pole so declared unsafe shall be a separate offence.

Is that the provision you refer to?

A. Yes, sir, the last Monday in November.

Q. Do you, in pursuance of that requirement, as Chief of Police, require the captains to make that specific examination of poles in their respective districts?

A. Yes, sir.

Q. How do you make that requirement, in writing, or do you communicate it to them when they meet in your office for consultation?

A. They meet in my office every morning in the year for consultation?

Q. And you give orders either in writing or orally to the captains assembled?

A. Yes, sir.

118 Q. The agreed facts state that certain reports were made for the years 1910, 1911 and 1912, in the official reports, of poles that were found defective. Are you able to state now from your recollection how many of those defective poles were found at special inspections, or how many were found at the general inspections?

A. I cannot tell that.

Q. Has it been the practise to make these special inspections in accordance with the ordinance?

A. We have been doing it ever since I have been on the force.

Q. How long have you been Chief?

A. I was Sergeant about ten months and then I was made Chief. I was patrolman before that.

Q. How did you make inspections?

A. I would take my stick and go around and sound them.

Q. And an unsound pole would—

A. Sound dead, and a sound pole would ring. That was the way we had to judge them.

By Mr. Meredith:

Q. Didn't you tell me that the reports that Mr. Pollard has just spoken to you about were not reports made at any special time, but were made all during the year?

A. Some of them. The orders are issued every year, and some of them the men have found in a day, and others are reported during the year.

Q. You have the reports of your captains?

A. Well, they are reported in the office; they send their miscellaneous reports and from them the report is sent to the captain.

Witness stood aside and Court took recess until the next day.

(Monday, October 13th, 1913, 10:00 A. M.)

119 LOUIS WERNER, recalled for further examination, testified as follows:

By Mr. Meredith:

Q. You understand that on Saturday I asked you to produce the reports that you said were made annually, of the annual inspection of the telegraph poles?

A. Yes, sir; I have not got them, they are sent to Mr. Thompson every year—once a year.

Mr. Pollard: State who Mr. Thompson is.

Witness: Superintendent of the Fire and Police Telegraph.

Mr. Meredith: Then I will ask you to get them.

Witness: You will have to summon him, I guess.

Mr. Meredith: Then I will ask that he be summoned.

Q. You state that you send to Mr. Thompson annually, a report of an annual inspection?

A. Yes, sir.

Q. Not of an inspection incidentally from time to time, but that you report to him annually? He has reports made to him annually, of an annual inspection.

A. Yes, sir.

Q. You are certain of that?

A. Yes. They come from the Captains to me, and I send them up to him, once a year—in the fall of the year.

Mr. Meredith: I ask that Mr. Thompson be summoned.

By Mr. Pollard:

Q. You do not mean to say that he has them now, but that you send them to him?

A. Yes, sir; they are sent to him, but of course I don't know that he has them now.

Q. You do, however, keep a record in your office of the poles dis-

covered to be imperfect, and they are in your annual report, as stated in your evidence?

A. Yes, sir.

120 Q. The number of poles found defective in the city are reported each year?

A. Yes, sir.

By Mr. Meredith:

Q. Now suppose you find a pole defective, not on what you allege to be an annual tour, but from policeman passing, from day to day, what do you do?

A. That is reported to the office, and that report is sent to Mr. Thompson.

Q. And then another comes along and you do the same thing?

A. Yes, sir.

Q. When do you make an annual report to him?

A. Once a year, in the fall—sometimes in November, sometimes in December, or October. There is an annual inspection made every year.

By Mr. Pollard:

Q. And when that is made you send the result of it to the Superintendent of Police & Fire Alarm Telegraph?

A. Yes, sir.

Mr. Meredith: I would like your Honor to send Mr. Thompson word to bring down any annual reports he may have made by the Chief of Police, as to defective poles.

By Mr. Pollard:

Q. Chief, do you send out annual orders to the Captains to have this inspection made?

A. I have been hunting over them, and I find one in 1911.

Q. You find in 1911 a report in your office directed to the Captains—a written report?

A. Yes, sir.

Q. Directing them to make that examination as provided by the ordinance?

A. Yes, sir.

Q. Have you that with you?

A. No, sir; you can send down to the Clerk and get it.

121 Mr. Pollard: I want that to go into the record. Let Mr.

Pollock bring that up.

Witness: I think he can get it here in a few minutes.

NOTE.—The witness was here excused, and the examination of Mr. Thompson and Mr. Pollock was deferred until tomorrow morning at 9:30 o'clock.

October 14, 1913.

LOUIS WERNER, being recalled, testified as follows:

Direct examination.

By Mr. Meredith:

Q. I asked you on yesterday please to bring an original of that order which you presented here on yesterday. Have you done so?

A. Yes, sir, I turned it over to the clerk, he has got it.

Q. Will you get it from him and let us see it.

Witness exhibits same.

Q. This is the paper you had in court yesterday, is it not?

A. Yes, sir.

Q. I asked you for the original of this.

A. That is the one we sent out.

Q. I asked you for the original. When was this paper made up?

A. 1910.

Q. This paper itself.

A. Yes, sir, that is the original, a copy.

Q. How do you file your papers?

A. File them in the filing case.

Q. And this is the original of the order. You did not tell us that yesterday.

A. That is the original copy.

Q. Yesterday I asked you to bring in the original this morning, and we adjourned for that purpose. You did not tell us that was the original.

122 A. I don't know whether I did or not. You asked for the Clerk, and I told you let him bring it up here.

Q. Didn't I ask you for the original yesterday?

A. Yes, sir.

Q. And didn't you tell me you didn't have it?

A. I told you a copy was sent to the captain and sent to the superintendent of the fire-alarm.

Q. I asked you yesterday for the original, and this morning you tell me this is the original.

A. It certainly is.

Cross-examination.

By Mr. Pollard:

Q. To whom is this sent?

A. Each captain.

Q. An original is sent to each captain?

A. That is the copy of the original.

Mr. Meredith: Don't suggest what you want.

Mr. Pollard: Mr. Meredith insists on the Chief producing the

original paper which he sent to somebody else. Now he says this is a copy of the original.

The Court: If the chief says that he sent the original to somebody else, and that is a copy——

Mr. Meredith: Your Honor heard what I said yesterday.

Witness: Probably I can make myself plain by saying that four copies are struck off from that, three are sent to the captains and one is retained in our office.

By Mr. Pollard:

Q. For your files?

A. Yes, sir.

Q. And this is the one retained in your office?

A. Yes, sir.

By Mr. Meredith:

Q. Will you tell us whether that is the original or a carbon copy? Look at it and see. (Witness examines.) That is a carbon copy, isn't it?

A. Yes, sir, this is a carbon copy.

Q. Do you sign carbon copies of everything you write?

A. When four papers come into the office I sign four of them.

Q. A man keeps a carbon copy of a letter he sends out and he signs the carbon copy too?

A. Yes, sir, I sign all four of them.

By Mr. Pollard:

Q. This paper is dated December 2nd, 1910, and is in the following language:

Notice to Captains.

Instruct your respective commands to inspect all poles on streets and alleys carrying wires, and report all found in defective condition.

* * * * *

LOUIS WERNER,
Chief of Police.

A. That's right.

Q. Do you tell the Court that that is a carbon copy of the paper that you sent out to the captains of the police force on December 2nd, 1910?

A. That is correct, yes, sir.

Q. So this is the copy that you found in the files of your office?

A. In the files, yes, sir.

Mr. Meredith: Did you find it?

The Witness: I asked Captain Pollock for it and he looked for it.

Mr. Meredith: I ask that that be struck out, if he didn't find it himself.

The Court: Do you know it of your own knowledge?

Witness: Yes, sir, I saw him look for it.

Mr. Meredith: Did you see him find it?

Witness: Yes, sir.

124 By Mr. Pollard:

Q. Then you tell the Court that this is the veritable copy found in the files of your office of the paper that was sent at that time?

A. Yes, sir.

Q. Have you sought, either directly or indirectly, to suppress evidence that should be brought into court?

Mr. Meredith: I object.

The Court: I don't think that ought to go in the record.

Mr. Pollard: Then I move to strike out all the questions in which Mr. Meredith imputed bad faith to the witness.

Mr. Meredith: Mr. Pollard ought to know that he cannot ask the witness whether he is telling the truth.

The Court: I will not let that go into the record. It is an imputation against an officer and that I do not think ought to go into the record.

Mr. Pollard: I except, and will file a bill of exceptions embracing this.

By Mr. Meredith:

Q. You were able to find what you allege is the copy of the original, whichever it is, of your order for 1910?

A. Yes, a carbon copy of the general order that went out.

Q. Of 1910?

A. Yes, sir.

Q. And you could not find one for 1911 or for 1912?

A. No, sir. I probably did not give any order, I mean any written order.

Q. Now this is your order: "Instruct your respective commands to inspect all poles on streets and alleys carrying wires, and report all found in defective conditions." Now, as I understand, the captains give an order of that character, as you claim?

A. Yes, sir.

Q. Then they tell their men as they go on their beats to

125 tap or make such tests as they can to the poles?

A. Yes, sir.

Q. And that is the way they make the test, as they go on their beats they tap the poles?

A. Sound them, yes, sir.

By Mr. Pollard:

Q. You stated just now that you didn't give any written orders. Did you give verbal orders in subsequent years?

A. Yes, sir.

Q. Under what circumstances?

A. The captains meet in my office every morning; when they come in there I sometimes give them a verbal order to look at these poles or everything else. They are in my office every morning of the year except Sunday.

Witness stood aside.

Evidence for the Plaintiff.

GEORGE E. POLLOCK, was duly sworn, and testified as follows:

Direct examination.

By Mr. Pollard:

Q. What position do you occupy in connection with the Police Department?

A. I am Secretary of the Police Department.

Q. How long have you held that position?

A. Eleven years.

Q. There has been a copy of an order produced here, dated December 2nd, 1910, signed by the Chief of the Police Department directing all captains to have the annual inspection of poles. Will you state to His Honor whether that is a correct copy from the files of the office?

126 A. Yes, sir, that is a correct copy of the order issued on the date given.

Q. Did you find it among the files?

A. Yes, sir.

Q. Do you keep files of papers that go out in writing?

A. Yes, sir.

Q. Do you keep them in a copy-book, or do you keep carbon copies?

A. Carbon copies.

Q. And this is a carbon copy of a paper that was issued on the date it bears?

A. Yes, sir.

Q. Mr. Pollock, what is the compensation of policemen, patrol men?

A. \$3.02 per diem.

Q. What does that amount to annually?

A. I do not recall; it is in the neighborhood of \$1100.

Q. How much are the sergeants paid?

A. \$101.00 per month.

Q. How much are the captains paid?

A. \$120.00 per month.

Q. What does the Chief draw?

A. \$2520 per annum.

Q. What is your compensation?

A. The same as that of captain of police. I rank as a captain of police.

Q. What is the total of the salaries in the Police Department chargeable to the City?

A. The payroll for the half month amounts to \$8,011 and some odd cents.

Q. Is the whole of that expense borne by the City of Richmond?

A. Yes, sir.

Q. Are you familiar with what occurs in the Chief's office?

A. Yes, sir.

Q. In regard to the directions to captains to make the annual inspection as required by the ordinance, how is that ordinarily communicated?

A. Either verbally or a written order is given yearly. The ordinance requires that the Police Department shall inspect poles during the month of November of each year.

Q. Are those orders issued?

A. Yes, sir.

Q. Either verbally or written?

A. Yes, sir.

Q. Every year?

A. Yes, sir.

Q. I hand you an unsigned paper dated December 15th, 1911, headed "Electric Light Poles, etc., Reported Dec. 15th, 1911" a carbon. State whether or not you identify that as a paper sent out from our office.

A. (Examining.) It was evidently sent out from the office. I cannot state when it was, because these reports are sent upstairs by Mr. Toler to the Superintendent of Fire-Alarm and Police Telegraph.

Cross-examination.

By Mr. Meredith:

Q. Did that paper come from your office in the last day or two?

A. I don't know.

Q. You did not get out that report?

A. No, sir. Mr. Toler makes up these and sends them to the Fire-Alarm Department.

Q. But you don't know anything about it?

A. No, sir, except that I believe it is correct.

Mr. Meredith: I object to your belief.

Q. Did I not come to see you a week or ten days ago?

A. Yes, sir.

Q. Didn't I go over the question of the procedure of the Police Department as to telegraph poles in the city of Richmond?

A. Yes, sir.

Q. Didn't you make me a statement then?

A. Yes, sir.

Q. Didn't you get out three printed books containing the reports of your department?

A. Yes, sir.

Q. Which contained a summary of the different things done?

A. Yes, sir.

Q. And was not one of the items one year 47 poles, and one year 100 and odd poles and one for 8 poles?

A. Yes, sir.

Q. Didn't you tell me that the report- as to those poles were made up from reports that came in from time to time during the year?

A. That was the annual report of the department that was shown you, and that was the aggregate number of poles reported during the year from defective conditions.

Q. Didn't you say that was the aggregate of poles that came in from time to time?

A. Yes, sir, including the annual inspection.

Q. Didn't you tell me that they didn't have only one day, but that the police were instructed that whenever they were out on their beats and performing their duties, as they went around and saw a pole at all defective, as they thought, to report it?

A. No, sir. I told you it was the duty of the police officers to report poles whenever they found them in a defective condition, but that once a year the entire department made an inspection of poles carrying wires in the city of Richmond.

Witness stood aside.

WILLIAM H. THOMPSON, being recalled, testified as follows:

Direct examination.

By Mr. Pollard:

129 Q. Mr. Thompson, I hand you a paper headed "Electric Light Poles, etc., Reported Dec. 15th, 1911." State where that paper came from.

A. This paper came from the Chief of Police's office.

Q. When?

A. December 15th, 1911, that is the date on it.

Q. You have been on the witness stand before, haven't you?

A. Yes, sir.

Q. State what action you take, as Superintendent of Police Telegraph and Fire-Alarm Department, when these reports are received from the Police Department?

A. When they are received I write to all the various companies as their names appear on the paper I hold in my hand, a letter.

Q. Please examine that paper and see if that is what you send out to the various companies on receipt of the paper that you now hold in your hand and that you first spoke of.

A. Yes, sir. This paper is dated December 16th, the following day.

Said papers are here read in evidence, as follows:

Electric Light Poles, etc., Reported Dec. 15th, 1911.

Va. Ry. & P. Co.'s poles #2838-2836-2835-2873-4176-2856-21034-21022-2839-2823-2816 in bad condition.

WAYMACK.

Va. Ry. & P. Co.'s poles #3558-2555-20020-2552-2000-2731 on Pike St. in bad condition.

WAYMACK.

Va. R. & P. Co.'s poles #2785, Perry St., 2679 W. 13th; 2651 11th; 2746 Semmes; 2618 W. 8th St.; 20556 W. 13th; Wall & Cowardin Ave. McDonough St., and Cowardin Ave.; 13th and Semmes, 15th and Semmes, in bad condition.

WAYMACK.

Va. Ry. & P. Co.'s poles at 10th and McDonough, W. 11th St. Semmes St. #20257 without number and no wires.

WAYMACK.

So. Bell Tel. Co.'s poles #3161-3135-3270-3266-3256-3253-3221-3226-3001-3134-2969-2911 Hull St., 2999, 8th and Perry, 2994 W. 8th St., 2993 W. 8th St. 2984 W. 8th St., 2967 W. 8th St., 2975 E. 6th St., 2924 Everett St., 3076 Stockton St., 3137 E. 10th St., 3144 Stockton St., 2921-2920-2699-2898-3172 W. 11th St., 3186 W. 11th St., 3125 10th St., 3126 10th St., 3115 Semmes St., 3027-3030-3032 W. 13th St., 3019-3092 Perry St., 3210 Porter St., 3213 — Ave., 3108 McDonough St., 3143 Stockton St., 3034 13th St., 3041 Semmes St., 3042-3206-3203 Semmes St., 3106 7th St., 3144 Stockton St., 3143 Stockton St., 6th and Stockton St.

WAYMACK.

130

December 16th, 1911.

So. Bell Tel. & Tel. Co., City.

GENTLEMEN: I am enclosing you list of poles and appurtenances which are reported by the Police Department as being in an unsafe condition. Kindly notify me when the same have been attended to.

Yours very truly,

City Electrician.

W. H. T.—H. T.

Q. Was the original of that letter signed by you?

A. Yes, sir.

Q. And that is the carbon copy that you read?

A. Yes, sir.

Witness stood aside.

GEORGE S. CRENSHAW was duly sworn, and testified as follows:

Direct examination.

By Mr. Pollard:

Q. Mr. Crenshaw, what position do you hold under the City Government?

A. That of Special Accountant, and at present acting Auditor.

Q. Will you state to his Honor what were the accruing revenues of the City, the aggregate total for the year 1912, and what the expenditures of the City were?

Mr. Meredith: I object.

Mr. Pollard: The City is charged with collecting \$240, a year out of this company. The object of this evidence is to show that that is de minimis.

Mr. Meredith: With that explanation of it I withdraw the objection. He desires to show that this thing is not necessary for the City, if I understand his position.

131 A. For 1912, \$4,122,931. The expenditures for the same year were \$4,303,516.

Q. Leaving a surplus of how much?

A. Leaving a balance in the treasury of \$284,352, as shown by the Auditor's Report, which I hold in my hand.

Q. What is the aggregate appropriation for the Police Department of the City of Richmond?

A. For 1913, the present year, it will be a rise of \$200,000.

Q. How much of that is salaries of the Police Department?

A. In round figures, \$192,000 for the present year.

Mr. Meredith: Let us have an understanding. The police Department you are speaking of is the general police department, one of whose duties is this about poles, as you claim?

Mr. Pollard: Certainly. I only claim that a percentage of that is to be charged up to this business.

Witness stood aside.

W. A. BARFOOT was duly sworn, and testified as follows:

Direct examination.

Mr. Pollard: Captain Barfoot is produced in court as requested by Mr. Meredith on yesterday.

Mr. Meredith: Stand aside.

By Mr. Pollard:

Q. Captain Barfoot, what position do you hold on the police force?

A. Captain of the First Police District, all east of Seventh street.

Q. How long have you been Captain?

A. Seven years.

Q. Will you state to the Court whether or not annually, in the month of November of each year the police captains are
132 ordered to have all poles in their respective districts inspected?

A. Well, we inspect once a year, but I don't know exactly the month. We inspect them once a year during the fall season, all poles every year.

Q. Do you do that in response to orders from the Chief?

A. Yes, sir, once every year.

Cross-examination.

By Mr. Meredith:

Q. It has been testified here that orders are given to the captains to give orders to the men for the poles to be examined or inspected, as you call it, and each Captain, I suppose, has charge in his particular district?

A. Yes, sir.

Q. And he tells his privates to-day or to-morrow, any day you pick out, as they go over their beats, to tap the poles or to make such examination as they can?

A. Every man is responsible for his beat, to inspect poles.

Q. I am not talking about responsibility. You tell them as they go over their beats to make such inspection of the poles as you deem proper, or what do you tell them?

A. I tell them to inspect all poles. He is supposed to have his club and examine all poles.

Q. Kick it with his foot?

A. He is supposed to use his stick.

Q. I saw you kick your foot just then and I didn't know whether you were kicking at an imaginary pole, or not. Then as a man goes on his beat he makes an examination?

A. Yes, sir.

Q. Then the next man goes out on his beat in six hours, or whatever the period is, and makes his examination?

A. Yes, sir, he examines his beat.

Q. You have a man for so many squares, six hours on and then another one on?

133 A. Yes, sir.

Q. And as he is performing his duties on his beat he makes this examination?

A. Yes, sir.

Witness stood aside.

A. S. WRIGHT was duly sworn, and testified as follows:

Direct examination.

By Mr. Pollard:

Q. What position do you hold in the police force?

A. Captain of the Third District.

Q. Where is the Third District?

A. All the South side of the River to the corporate limits of Richmond.

Q. How long has the South side been a part of the corporation of Richmond?

A. Four years next April.

Q. State what you do, if anything, in the matter of making an annual examination of the poles in your district?

A. We have for the past three years inspected them once a year.

Q. Is that or not done in pursuance of orders specially to do it?

A. Yes, sir.

Cross examination.

By Mr. Meredith:

Q. You heard Captain Barfoot's statement; is that the way you make inspections?

A. No, sir, I detail a special man to do it.

Q. You are in the part of the City that used to be called Manchester, are you not?

A. Yes, sir.

Q. And you have one man, and he goes around and examines poles?

134 A. Yes, sir.

Q. And then he makes a report to you the next morning?

A. Yes, sir, or sometimes several days pass.

Q. You have in Manchester lines on how many streets?

A. Pretty much all of them, nearly all the streets over there.

Q. That is, in what they call Manchester?

A. Yes, sir.

Q. And you have a special man detailed to examine poles for maybe as much as a day or two?

A. Yes, sir.

Q. The poles that you speak of are not simply the poles of the Postal Telegraph Cable Company, but the poles of the Western Union and Passenger & Power Company?

A. Yes, sir, every pole.

Q. And it takes him some times a couple of days to make that examination?

A. Yes, sir.

Witness stood aside.

GEORGE W. EPPS was duly sworn, and testified as follows:

Direct examination.

By Mr. Pollard:

Q. Captain Epps, how long have you been a Captain on the police force?

A. I have been a Captain in charge of the Second District seven

years. I was Inspector of the Police Department with the rank of Captain for several years before that.

Q. Will you state whether or not there is an inspection of electric light and power poles every year?

A. Yes, sir, all poles carrying wires.

Q. In what month?

135 A. Well, in the fall, I wouldn't like to designate the month, but some time in the later part of October, or November.

Q. Is that done in pursuance of special orders?

A. Yes, sir, once a year, but poles are reported at other times than the annual inspection. I reported one myself at Dinneen and Leigh Streets over two months ago.

Q. I understand that you make an annual inspection, and in addition to that the patrolmen are requested to be on the lookout?

A. To look out for them at all times, just as they would for any dangerous object.

Q. How many years has this been the practise?

A. Oh, quite a number, ever since I have been in charge of the district, I know, and long before that. We always did look after poles, just as we would a tree, or anything else that was dangerous.

Cross-examination.

By Mr. Meredith:

Q. You mean, Captain, that some day in the fall of the year you tell your men as they go out that they must make the annual inspection of poles?

A. Yes, sir. We get the order from the Chief of Police; very often we get it in his office, and as soon as I get in my office I have it put on the blotter, and that is read out to the men, to make a careful inspection of all poles carrying wires on their beats.

Q. And then as they go along, they tap them, or look at them, or whatever else is necessary?

A. Yes, sir.

Witness stood aside.

The City of Richmond, reserving any right given under Section 16 of the Agreed Facts, introduced in evidence Sections 7, 8, 11, 19 and 22 of Chapter 32 of Richmond City Code of 1910, which reads as follows:

136 Chapter 32.

Concerning the City Electric Light and Power Plant, the Committee on Electricity, City Electrician and the Examination and Licensing of Electricians.

7. That the committee on electricity, shall as soon as practicable after July 1, 1909, and biennially thereafter, appoint two electrical

inspectors whose duty it shall be, under the direction of the city electrician, to inspect electrical wirings inside of and outside of buildings, and also to perform such other duties pertaining to the department of electricity as may be required of them respectively by the city electrician or the committee on electricity; such appointments shall be made from a list of not less than six competent electricians to be furnished to said committee by the city electrician. The said inspectors shall receive a salary of one thousand and eighty dollars (\$1,080.00) per annum each, payable as other salaries are paid. (January 6, 1910.)

8. That the city electrician may also from time to time employ, under direction of the committee on electricity, such other persons as may be necessary for the proper inspection or removal of such electrical appliances as may be deemed unsafe by him and not in accordance with rules and ordinances adopted by the council of the city of Richmond, and for which no owner can be found; but in any case where an owner can be found for any such appliances which are not now in use, such owner shall be required to remove such appliances, and upon his failure so to do, when required by the city electrician, he shall be liable to a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00), recoverable in the police court. (May 17, 1902.)

11. It shall be the duty of the electrician of the city to look after and keep in repair and proper condition all electrical apparatus owned and controlled by the city, and shall inspect all overhead street-construction poles, brackets, cross-arms, and all connections inside or outside with buildings, test the candle-power of any and all electric lights furnished by contract to the city, and such other electrical work as may be required of him by the committee on electricity; he shall keep a faithful record of all applications to string wires in streets or houses, whether approved or rejected, and shall immediately inspect all new work and report the same to the committee. (April 12, 1901.)

19. No repairs, changes or additions shall be made in or to wiring already installed in buildings without a permit therefor from the city electrician, nor shall any change be made in any isolated or private plant without first obtaining a permit from the city electrician. (May 14, 1906.)

22. On any pole of any electric light, power, street railway, telephone or telegraph company used jointly by two or more such companies, each company shall be allotted a special zone and shall confine its wires to that zone. Spaces shall be measured from the tops of poles downward, and the uppermost zone on every pole shall be at all times reserved for the free use of city wires. (May 14, 1906.)

which was all the evidence introduced, and the Court after hearing argument by counsel entered the following judgment:

"This day again came the City of Richmond, by H. R. Pollard, City Attorney, as well as the defendant, by Meredith & Cocke and Leake & Buford, its Attorneys, and the Court having fully heard and

maturely considered the evidence and arguments of counsel, is of opinion and doth decide that the said Postal Telegraph-Cable Company is guilty of the violation of the City Ordinance as charged, and doth impose upon it, the said defendant, a fine of Fifteen Dollars. Whereupon it is considered by the Court that the City of Richmond recover against the said defendant a fine of Fifteen dollars, together with its costs by it in this behalf expended.

138 To which action of the Court in giving judgment against it, the said defendant, by its Attorneys, excepted, and moved the Court to set aside the said judgment on the ground that the same is contrary to the law and the evidence and grant it a new trial, which motion the Court overruled; to which action of the Court in overruling its said motion the defendant, by its Attorneys excepted and by agreement of parties made at bar through their respective Attorneys, and hereby entered of record, time is allowed the said defendant, not to exceed sixty days from the expiration of the present term of this Court, to prepare and file all of its Bills of Exceptions.

And at the request of the said defendant, by its Attorneys, the execution of the said judgment is suspended for a period of ninety days from this day, in order to allow it time to apply to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to the judgment aforesaid."

Whereupon, the said Postal Telegraph-Cable Company objected to said judgment and to the entry thereof, but the Court overruled said objection and ordered the entry of said judgment, to which action of said court in entering said judgment and in overruling said objection of the said Company, the Postal Telegraph-Cable Company excepted, and tendered this 2nd Bill of Exceptions, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done,

D. C. RICHARDSON, *Judge*. [SEAL.]

In the Hustings Court of the City of Richmond,

CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY.

Bill of Exceptions No. 3.

Be it remembered that upon the trial of this cause after 139 both sides had waived a hearing before a jury and had submitted the case to the Judge of said Court to be heard upon the pleading and evidence, and after the evidence had been introduced as set forth in Bill of Exceptions No. 2, to which reference is hereby made, and after the court had entered judgment set forth in said Bill of Exceptions No. 2, to which reference is hereby made, the Postal Telegraph-Cable Co. moved the Court to set aside said

judgment and grant it a new trial, but the Court overruled said motion and refused to set aside said judgment and grant it a new trial; to which ruling of the Court in refusing to set aside said judgment and to grant a new trial, the said company excepted and tendered this its Bill of Exceptions No. 3 and prayed that the same might be signed, sealed and made a part of the record; which is accordingly done.

D. C. RICHARDSON, *Judge*. [SEAL.]

VIRGINIA:

In the Hustings Court of the City of Richmond.

CITY OF RICHMOND

VS.

POSTAL TELEGRAPH-CABLE COMPANY.

I hereby waive notice required by the statute of the furnishing of a transcript of the record in the above entitled case.

Given under my hand this 19th day of November, 1913,

H. R. POLLARD,
City Attorney.

A transcript of the record.

Teste:

WALTER CHRISTIAN,
*Clerk of the Hustings Court
of the City of Richmond.*

Costs of this record \$30.00. Paid by C. V. Meredith, Atty.

140 In the Clerk's Office of the Supreme Court of Appeals of Virginia, at Richmond.

POSTAL TELEGRAPH-CABLE COMPANY

against

CITY OF RICHMOND.

I, H. Stewart Jones, Clerk of the said Court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said Court in this case.

Witness my hand and seal this the 21st day of September, 1915.

H. STEWART JONES, C. C.

Fee for transcript of this record \$33.22.

Exhibit No. 7, Filed with Answer of City of Richmond.

CITY OF RICHMOND, *To wit:*

To any police officer of said city:

Summon Postal Telegraph-Cable Company, a corporation to appear before me or some other Justice of the Peace of said City, at the Police Justice's Court, in the City Hall, on the first day of June, 1915, at the hour 9:30 o'clock A. M., to show cause, if any it can why a fine of not less than five dollars nor more than one hundred dollars should not be imposed on it for its failure to pay to the City Treasurer between the first day of January, 1915, and the 15th day of January, 1915, the sum of \$2.00 on each and every of 316 poles, used, possessed and maintained by it, in the parks, streets, lanes and alleys of the City of Richmond during the year 1915, aggregating the sum of \$632.00, the payment of which is required by sections 10, 11, 12 and 13 of Chapter 40 141 of Richmond City Code 1910 "Concerning Wires, Poles, conduits, etc., in, over and under the Streets," as compensation for the use of the parks, streets, lanes and alleys of the City of Richmond on which said Postal Telegraph-Cable Company did use, possess and maintain 316 poles on the first day of the fiscal year 1915; and also show cause why a further fine should not be imposed for each day's failure to pay said sum of \$632.00, since the 16th day of January, 1915.

And be you then there to certify what you have done in the execution thereof.

Given under my hand and seal in said City this 24th day of May, 1915.

JNO. J. CRUTCHFIELD, [SEAL.]
Police Justice.

Exhibit No. 8, Filed with Answer of City of Richmond.

(Approved July 19, 1915.)

An ordinance to amend and re-ordain section 13 of chapter 40, concerning wires, poles, conduits, etc., in, over and under the streets, of Richmond City Code 1910.

Be it ordained by the Council of the City of Richmond:

1. That section 13 of Chapter 40, Concerning wires, poles, conduits, etc., in, over and under the Streets of Richmond City Code, 1910, be amended and re-ordained so as to read as follows:

13. Any person, or persons, or corporation using, possessing, or maintaining, any telegraph, telephone, electric light, or other poles, in any of the streets, lanes or alleys of the City of Richmond, who shall fail to file with the city engineer the list as prescribed in section nine of this chapter, or who shall fail to have stamped, printed or painted in legible characters his or its name as owner

upon each of such poles, as prescribed in said section nine, 142 by the twentieth of January of each and every year; or who, if belonging to the classes required to pay a fee of two dollars on each pole by section ten, shall fail to pay the said fee, or shall fail to have the tin plate therein prescribed securely fastened in some conspicuous place by the said twentieth day of January of each and every year, upon all such telegraph, telephone, electric light, or other poles so used, possessed or maintained by him or them, shall be liable to a fine of not less than one nor more than five dollars for each pole upon which he, they or it are so in default; and each day of default to be a separate offence. Such fines to be imposed by the police justice of Richmond; provided, however, that the fines imposed under this section shall not in the aggregate exceed a sum equal to \$2.00 per pole on the aggregate number of poles used, possessed or maintained by the person or corporation so fined.

2. This ordinance shall be in force from its passage.

A true copy.

BEN. T. AUGUST,

City Clerk.

Filed October 30th, 1916.

Statement of Tax on Poles Owned and Used by the Postal Telegraph-Cable Co. for the Years 1904 to 1915, Inclusive, and Amounts Paid to Date, Showing a Balance of \$666.00 Due the City of Richmond.

Year.	Poles owned.	Poles used.					Total No. of poles.	Rate.	Amount.	Date paid.	Amount.
		W.C. & T. Co.	S.E.T. & T. Co.	Va.E. & T. Co.	R. T. & T. Co.	R. P. & T. Co.					
1904, . . .	94	4	16	..	..	..	114	2.00	228.00	5/28/04	228.00
1905, . . .	94	4	16	..	..	..	114	2.00	228.00	5/19/05	228.00
1906, . . .	103	10	..	..	..	..	113	2.00	226.00	5/1/06	226.00
1907, . . .	126	..	1	1	..	..	128	2.00	256.00	3/27/07	256.00
1908, . . .	126	..	..	..	2	..	128	2.00	256.00	4/13/08	256.00
1909, . . .	126	..	..	5	2	12	145	2.00	290.00	3/25/09	290.00
1910, . . .	123	..	11	6	..	32	172	2.00	344.00	4/19/10	344.00
1911, . . .	123	..	11	6	..	32	172	2.00	344.00	4/4/11	344.00
1912, . . .	192	..	..	..	..	..	315	..	630.00	5/4/12	384.00
1913, . . .	192	..	..	..	..	..	312	..	624.00	..	..
1914, . . .	192	..	..	..	..	..	192	..	384.00	7/1/14	..
									101.44	7/1/14	1,355.44
Interest on amounts unpaid for 1912-1913-1914.									3,911.44		3,911.44
1915, . . .	316	..	14	3	..	..	333	2.00	666.00	Unpaid Nov., 1915	1915

Notes.—*Poles used by P. T. C. Co. taken from reports made by the companies named but not included in report made by the Postal Telegraph-Cable Co.

**The local manager of the above company reported in January 1914, the removal of all attachments from poles of other companies, which explains for no charge other than for poles owned.

For the years 1910 and 1911 the Postal Telegraph-Cable Co. paid to the Deputy Treasurer, South Richmond, the sum of \$144.00 and \$138.00 respectively for poles owned and used in South Richmond, November 16th, 1915. Prepared by:

H. C. COFER, *Special Accountant.*

Filed October 30th, 1916.

Affidavit of R. J. Hall.

STATE OF NEW YORK.

County of New York, To wit:

R. J. Hall, Assistant Treasurer of the Postal Telegraph-Cable Company, a corporation organized and existing under the laws of the State of Delaware, being first duly sworn, deposes and says as follows:

The gross receipts derived by the Postal Telegraph-Cable Company from all of the interstate business done at the City of Richmond, in the State of Virginia, in the year 1914, amounted to twenty-one thousand, one hundred and twenty-two and 12/100 (\$21,122.12) dollars; that the total gross receipts derived by the company from the intrastate business done at Richmond amounted to four thousand six hundred and fifteen and 39/100 (\$4,615.39) dollars, or in other words, that seventeen and ninety-three hundredths (17.93) per cent of the receipts from the business of the Richmond office for 1914 was from intrastate business, while the remainder, 82.07% of the receipts, was from interstate business; that the entire expense for 1914 at the Richmond office, not including license fees, nor taxes, nor interest on the investment, nor depreciation, nor over-head expenses, was twenty-two thousand, nine hundred and ninety-eight and 57/100 (\$22,998.57) dollars, and that the proportionate part of said expense properly chargeable to the intrastate business would be 17.93% thereof, or four thousand one hundred and sixteen and 64/100 (\$4,116.64) dollars; that the general over-head expense of the complainant, namely, that of superintendence, general management, and corporate expenses, for the year 1914 was \$267,277.61, and that the entire receipts of the complainant for the said period was \$1,153,353.38, or in other words, that the over-head expenses were twenty-three and seven hundredths (23.17%) per cent of the receipts, and that, therefore, the proportionate part of the over-head expenses which

145 should be charged to the intrastate business at Richmond is 23.17% of \$4,615.39, or \$1069.38; that the taxes paid to the State of Virginia for the year 1914 were four hundred and fifty-one and 66/100 (\$451.66) dollars as an ad valorem tax, and fourteen hundred and thirty-five and 56/100 (\$1435.56) dollars as a State license tax; that the total intrastate business of complainant in Virginia during 1914 was fifteen thousand seven hundred and eighty-seven and 27/100 (\$15,787.27) dollars, and the total intrastate business done at Richmond was \$4,615.39, or, in other words, 29.23% of the total intrastate business of the company was done at Richmond; that the proper proportion of the expense of the State license tax of \$1435.56 chargeable to the intrastate business at Richmond, namely, 29.23% thereof, is \$419.61; that

the property of the complainant in Richmond is valued at fourteen thousand, two hundred (\$14,200.00) dollars; that the average depreciation of values of its property is about 10% of the value thereof per annum.

That the taxes paid the City of Richmond for the year 1914, was \$44.81 as an ad valorem tax, the proper percentage chargeable to intrastate business being \$8.03.

That the foregoing statement of receipts and expenses is ordinary, and fairly represents the proportion of other years, and the receipts and expenses for the current year of 1915 so far had, indicate and show that the proportion will fairly represent the year 1915.

And that the receipts and expenses, and the character of the business done is such that the ratio between intrastate and interstate receipts will fairly represent the proper ratio of expenses between interstate and intrastate business.

Given under my hand this 15th day of December, 1915.

R. J. HALL.

Subscribed and sworn to before me in my County of New York, State of New York, this 15th day of December, 1915.

[SEAL.]

HENRY A. VAN DER PAUWERT,

Notary Public, Notary Public, Kings County, No. 30.

Certificate filed in N. Y. Co., No. 9.

146

Affidavit of Edward Reynolds.

STATE OF NEW YORK,

County of New York, ss:

Edward Reynolds, being duly sworn deposes and says that he is Vice-President and General Manager of the Postal Telegraph-Cable Company, the complainant herein. Deponent further says that he has been engaged in the telegraph business for upwards of thirty-four years, having held the following positions in the telegraph service in the respective order as stated: namely,

As Messenger, Telegraph Operator and Office Manager, about	11 years
As Chief Clerk to a District Superintendent (an operating officer) for a period of about	6 "
As Chief Clerk to the Vice-President having charge of the lines and offices, and the handling of traffic over the entire Postal System	2 "
As General Auditor for the entire Postal System for a period of about	12 "
As Vice-President and Assistant to the President, for a period of about	5 months
As Vice President and General Manager, in charge of all operations down to the present time	2 years
and	7 months

As a Messenger, Telegraph Operator and Office Manager in large and small cities and towns, the deponent became familiar with the methods of collecting, forwarding, accounting and estimating the expense connected with telegrams.

As Chief Clerk to a District Superintendent, the deponent was required as the agent of the Superintendent to supervise all details of management in cities and towns within a specified territory, this territory being bounded on the north by the Dominion of Canada, on the east by an imaginary line ending at Greenfield, Mass., on the west by an imaginary line ending at Wilkes-Barre, Pa., and on the south by the Atlantic Ocean, the City of New York being included in the territory described.

In his capacity of Chief Clerk to the Superintendent, it
147 was necessary for the deponent to be familiar with the methods of securing telegraph business and of handling it afterwards and of the cost of handling, and with the accounting and statistical reports of the company's agents.

As Chief Clerk to the Vice President mentioned above, the deponent's duties required him to pass upon all questions relating to the movement of the telegraph traffic and the cost. He also was required to analyze all office and statistical reports sent in by agents in the field relating to the financial results in the cities, towns and districts under their supervision, and assist the executive officers in controlling the expenses and in developing the company's policies.

As General Auditor of the company, mentioned above, the deponent had charge of all the books of account for the entire Postal System and the preparation of all statistics required of him as an accounting officer, and it was his duty to study the operating results in the different parts of the Company's System in connection with his statistical reports and to analyze the results shown; point out the objectionable spots and assist the executive officers in arranging methods for the elimination of extravagance in management and in improving the method of conducting the business in all parts of the country.

The deponent wishes to add that in his capacity as Auditor, as far back as 1905 or 1906, he personally arranged and introduced a uniform system of accounting for all telegraph offices in the Postal System, and visited the principal offices of the company throughout the country introducing that system, and by such personal visits acquired an intimate knowledge of local conditions and the methods employed moving telegrams from the place of origin to their destination.

The deponent would further add that in 1912, while still acting as Auditor of the company, he caused to be introduced into the large
operating department a system of cost accounting to be applied
148 directly to the labor charge for the handling of telegrams and the introduction of this cost system made it necessary for him to be familiar with the details connected with the handling of telegrams, particularly those details affecting the cost of same.

As Vice President and Assistant to the President, the deponent

spent upwards of one year visiting agents in the field and in the study of methods connected with the upbuilding of the business of the Postal Company, and in handling that business in the most advantageous manner, and that necessarily called for a study of the subject of operating conditions and the factors that enter into the expense of handling cablegrams and telegrams.

As Vice President and General Manager during the past two years and seven months, the deponent has devoted his entire time to the study of the telegraph business with a view of placing its management upon a more scientific basis, and has had to pay close attention to the assignment of the company's wires and the means employed to collect and transmit telegrams and cablegrams to speed up the service at the least cost, and hence has studied every item of the cost.

The deponent further says that his knowledge and experience justifies him in saying that the most equitable method of determining the proper proportion of the expenses incurred in and properly chargeable to intrastate business and interstate business, is to divide the expense according to the ratio which exists between the interstate and intrastate receipts. Such a division of expense between interstate and intrastate receipts is the method which was accepted and approved by the Supreme Court of Georgia in the case of the Postal Telegraph-Cable Company vs. City of Cordele, reported in 141 Ga. 658, decided in 1914.

To explain the Cordele plan of dividing expenses between intrastate and interstate business, it will be necessary to show in some detail how telegraph traffic is handled.

The operating cost for handling telegraph traffic varies according to the operating methods followed by the office originating the message. The methods are determined by the wire assignments.

Some offices (and they are usually the offices that originate the largest amount of business) have direct wires to large commercial points outside of the state over which all interstate messages are sent by one transmission.

Some offices have only local wires and are compelled to send their interstate messages to a large commercial center within the state to be forwarded over direct wires from that point to points outside the state.

Some offices work direct with a number of offices within the state.

Some offices have no connection with any office except the large commercial center referred to above, to which all messages are sent to be forwarded.

The wages paid to office managers, operators, clerk, and messenger boys is the largest item in the operating expense of a telegraph company, and telegraph men experienced in the handling of telegraph traffic know that the more often a message is handled the greater its cost.

A telegraph operator handles both kinds of messages indiscriminately as they come to the office, and with the same instrument and the same Morse alphabet and the same wire, and, in fact, the same in every way, and the labor cost, therefore, is the same each time a

message is handled, whether it is an interstate message or an intrastate message. The total cost of a message is determined by the number of times it is handled.

The expense for collecting both kinds of messages is the same whether collected by messenger or by telephone or if filed in our offices over the counter, because both kinds of messages are handled by messengers and clerks indiscriminately.

The same is true of the cost of delivering intrastate and interstate messages.

150 The interstate messages originating at the large offices in

Virginia (all of which have direct wire connections to points outside the state) are disposed of by the originating office with one transmission.

Intrastate messages originating at offices in the State of Virginia when destined to other offices with which the originating office has direct connection, are handled by operators twice.

But if the office of origin is not connected by direct wires with the office of destination for the interchange of intrastate messages, such messages are sent to an intermediate point, a relay point, to be forwarded to the office of destination. Such messages are handled in the Operating Department four times.

Interstate messages originating at offices in the State of Virginia having no direct connection with points outside the state are sent to the nearest large commercial center, a relay point, to be forwarded by that office to the office of destination and such messages are handled four times.

- (1. Sent from office of origin to intermediate point.)
- (2. Received at intermediate point.)
- (3. Transmitted to outside point by intermediate point.)
- (4. Handling of such interstate messages outside of the state.)

Intrastate messages destined to a place within the State not in direct communication with the office of origin must be rehandled at an intermediate point, and such messages are handled four times.

- (1. Sent by office of origin to intermediate point.)
- (2. Received at intermediate point.)
- (3. Transmitted by intermediate point to office of destination in state.)
- (4. Received at office of destination in state.)

That the larger portion of the interstate business done by the Postal Telegraph-Cable Company at Richmond is the transmission of messages between Richmond and large commercial points outside of the State of Virginia, between which points and the office at Richmond are direct wires of the company, and the mes-

151 sages are sent by one transmission without expense of relay,

such as is the case in messages between Richmond and New York, Philadelphia, Baltimore and Washington. But in its intrastate business done at Richmond, it is necessary that every message be relayed and thereby handled four times, except messages between Richmond and either Norfolk and Farmville, there being only two direct lines in operation from points in Virginia to Richmond.

namely, from Norfolk and from Farmville. The company operates eighteen offices in the State of Virginia.

The above relates to the cost for labor in operating rooms for operators and clerks, but there is another large labor cost in connection with the handling of telegrams, and that is the cost of collecting and delivering them by messenger boy.

An intrastate message is collected by messenger at one point and delivered by messenger at another point within the state and we have a labor cost for two handlings by messenger.

Again it is necessary to divide the expense for office supplies on a percentage basis, followed by the Cordele plan, because our largest issue of blank forms is for sending blanks that are distributed freely to the public, and their cost and the cost of all other forms should be divided according to their use, which is the same per message, whether intrastate or interstate.

The expense for office rents is another item that can only be equitably divided on a percentage plan, because the space used for telegraph offices and the number of seatings for its employes is governed by the volume of business transacted in each place, and the office space should be divided pro rata according to the volume of intra and interstate business handled.

A part of the expense is incurred, of course, in the construction and maintenance of lines, and the same line is used in part for interstate and intrastate messages. These interstate messages, however, which are handled by the telegraph company are not transmitted on the average over a greater distance on the telegraph company's lines than intrastate messages, this being due to the zigzag method in which intrastate messages are necessarily handled as compared with direct routes traversed by interstate messages.

The relation between the expenses for handling interstate messages and intrastate messages on the one side and the rate charged for same, on the other, does not change the application of the Cordele plan.

For instance, on a telegram or cablegram from Richmond to India the entire toll would have to be divided between at least three different companies, namely, the Postal Company and the Commercial Cable Company in the Atlantic Ocean, and the English Company having lines from London to India, and in these interstate or international messages the division of toll results in complainant getting only about as large a toll for its part of the work on an interstate or international message as it gets on its intrastate messages because it keeps the whole of the latter but has to give up a very large part of the former to connecting lines.

The experience of the telegraph company spread out over many years has shown that the overhead and supervising expense rises and falls in about the same proportion as the gross revenues, and the only practical method of dividing this overhead expense is by making the interstate or intra-state traffic bear such share as that particular class of traffic bears to the total volume of traffic handled.

In the case of offices having direct wires to points outside the state

to which all interstate messages are forwarded by one transmission, the labor cost on all intrastate messages originating at such offices is from two to three times greater than on an interstate message.

The Cordele plan favors the intrastate business by assessing it with a smaller proportion of the operating costs than it should be required to bear, but as the actual cost cannot be established, the Cordele plan has been accepted as a practical and equitable method. It gives a division of the total cost of operations that is approximately correct and not unduly burdensome to either class of business.

It is to be mentioned also that telegraph companies doubt greatly whether they derive any profit whatsoever from the transmission of intrastate telegrams, inasmuch as these messages bear only a 25 cent toll. A representative of the Western Union Telegraph Company testified a few years ago before the Public Service Commission of New York that his company believed that it lost money on every 25 cent telegram. At a hearing before the Public Service Commission of Massachusetts, on November 24th, 1915, the Traffic Superintendent of the Western Union Telegraph Company testified that money is lost by that telegraph company on all 25 cent messages. I would mention that all of the intrastate telegrams in Virginia are limited to a 25 cent toll, excepting, of course, where the number of words exceeds 10. I am not prepared to state that the Postal Telegraph-Cable Company incurs an actual loss on these 25 cent intrastate telegrams, but I do wish to state that the profit, if any, on that class of telegrams is exceedingly small, and that any mode of figuring by which the expenses are apportioned between interstate telegrams and intrastate telegrams, according to the comparative receipts from those two sources, is decidedly in favor of the intrastate telegrams, and that as a matter of fact the intrastate telegrams, should bear a much larger proportion of the expenses than is indicated by its volume of receipts as compared with the volume of interstate receipts, inasmuch as an intrastate telegram is handled by operators on the average as many times at least as an interstate telegram.

EDWARD REYNOLDS.

Sworn to before me this 5th day of January, 1916.

[SEAL.] • HENRY A. VAN DER PAUWERT,
Notary Public, Kings County, No. 30.

Certificate filed in N. Y. Co. No. 9.

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Affidavit of Edward Reynolds.

STATE OF NEW YORK.

County of New York, ss:

Edward Reynolds, being duly sworn, deposes and says, supplementing his affidavit of January 5th, 1916, it is impossible to establish the exact cost of any particular message, or class of messages, because all commercial telegraph messages are handled indiscrimi-

mately as they come to the office, and in the same manner and with the same apparatus, but it is possible to arrive at the average cost of a message, and for the purpose of showing the average operating cost of a message, he submits below a statement showing clearly how the average cost per message is obtained.

In the year 1915 the Postal Telegraph-Cable Company operating in the State of Virginia and in adjacent states, handled 3,170,098 messages. Within the City of Richmond during the same year, 71,138 messages were handled. To establish the proportion of the overhead expense chargeable to messages handled in Richmond,

the deponent has taken $\frac{71,138}{3,170,098}$ of the various items making up the overhead operating expenses.

		Expenses.	No. of messages.	Avg. cost per message.
Actual Local Expenses Paid at Richmond, Va.:				
Wages of Managers, Operators, Clerks & Messengers		\$18,909.13	X 71.138	\$.26580
Rents, Light & Fuel Freight & Express.....		1,397.38	X 71.138	.01964
Stationery & Postage		619.88	X 71.138	.00871
Office Equipment & Battery		1,194.41	X 71.138	.01678
Miscellaneous		182.34	X 71.138	.00256
Total Local Costs		\$22,303.14	X 71.138	\$.3134
155 Overhead Expense:				
Taxes & Insurance.....	71.138	of \$37,332.57	- 837.66 X 71.138	\$.01177
	3,170,098			
Rentals pd. for lines leased.....	"	15,689.32	- 352.07 X 71.138	.00494
Maintenance of Lines.....	"	187,039.26	- 4,197.22 X 71.138	.05893
General Law Expense.....	"	1,640.00	- 36.80 X 71.138	.00051
Sal. & Exp. General Offices.....	"	29,439.27	- 625.83 X 71.138	.00879
Electrician	"	5,229.97	- 117.36 X 71.138	.00164
Miscellaneous	"	9,742.10	- 218.61 X 71.138	.00307
Local Proportion of Overhead Costs.....			\$6,385.55 X 71.138	\$.0897
Average Cost Per Message Paid Locally				31.34 cents
" " " " For Overhead.....				8.97 "
Total Average Cost Per Message.....				40.31 cents

The deponent in his affidavit of January 5th, 1916, pointed out that an intrastate message costs more than an interstate message, and he now wishes to add that in applying the average cost under the method described above he is favoring intrastate messages.

The gross revenue from intrastate messages handled in Richmond, Virginia, during the year 1915 amounted to \$4,219.13.

The number of intrastate messages handled during that year was 12,844.

The average toll collected per message for intrastate messages was 32.857 cents.

The loss on intrastate messages in the year 1915 was the difference between the average cost per message of 40.31 cents, and the average toll collected per message of 32.85 cents, or 7.46 cents on 12,844 messages.

EDWARD REYNOLDS,

Sworn to before me this 15th day of March, 1916.

[SEAL.]

L. R. THOMAS,

Notary Public.

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Statement of Agreed Facts "X."

Filed October 30th, 1916.

It is stipulated and agreed by the respective parties to the above suit, by their respective counsel, that the following facts may be considered by the above Court, or by any other court to which these proceedings may be appealed, as in evidence before it upon any hearing of said cause.

1. The Postal Telegraph-Cable Company, a corporation created under the laws of the State of Delaware, obtained permission to erect poles and run suitable wires thereon in the City of Richmond, by an ordinance of the City Council, approved March 16th, 1889, which ordinance is filed with the answer of said City in this cause and is to be read as a part of this agreement.

2. That after the enactment of the said ordinance the said Telegraph Company, in pursuance of Section 1 of said ordinance, applied to and obtained from the Committee on Streets the right to erect poles and run wires on certain streets of the City, and in pursuance of said permission proceeded to erect its said poles and run its wires on the streets of said City, and has from that time to the present time maintained said poles and wires on some of the streets of the City, and, since 1903, has maintained its wires in conduits in other of said streets.

3. That by an ordinance, approved Sept. 10, 1895, embodied with certain amendments thereto in Richmond City Code 1899 as Chapter 88, it was provided, by sections 27 and 28, that all telegraph, telephone and electric light power, overhead wires and cables (other than trolley wires), and all other appliances for conducting electricity, and the poles therefor, theretofore and then in any street, alley or public place of the City, owned and maintained under any existing franchise, were ordered to be removed and placed underground in certain territory (known as the underground district) within twelve months from the date of the approval of said ordinance, and subsequently said section 27 was amended by an ordinance approved March 15, 1902, and section 28 by an ordinance approved December 18, 1903.

4. That on the 8th day of September, 1904, said Telegraph Company having failed to comply with said sections 27 and 28 of said Chapter 88, the City of Richmond filed a petition in the Supreme Court of Appeals of Virginia, praying a writ of mandamus com-

pellings said Company to comply with said sections by placing their wires underground in certain territory within the City of Richmond, to which petition the said Company filed its answer, copies of which petition and answer are contained in Exhibit R. No. 3, filed with the answer of the City of Richmond in this cause.

5. That after the said case in the said mandamus proceedings in the said Supreme Court of Appeals of Virginia had matured for a hearing, but before the decision had been made by the Court, the City, at the suggestion of the City Attorney, adopted the ordinance contained in Section 34, Chapter 40, Code of Richmond, 1910, in order to meet the position taken by counsel for said Company in its Supplemental Brief, reading as follows:

"The defendant assents to proceed and construct this underground conduit, if the City will acknowledge that the defendant does not hereby waive its Federal franchise."

And thereafter an agreement in writing was entered into between the City of Richmond and Messrs. Meredith & Cocke, representing the Telegraph Company, by which "controversy involved in the litigation between the said parties" was settled, the exact terms of which agreement are set forth in a paper filed as Exhibit No. 4 with the answer of the City of Richmond in this cause.

6. That on March 21, 1906, W. E. Cutshaw, City Engineer of the City of Richmond, addressed a letter to the said Telegraph Company,

informing it that he was instructed by the Committee on Streets to notify them to submit to said Committee within two months from that date "plans and details, showing location, plan, size, construction and material of the conduits to be constructed by you (it) in pursuance of sections 27 and 28 of Chapter 88, Richmond City Code 1899, as amended, and that you (it) will be required to complete your (its) work within six months from this date," and that, in compliance with said notice, said Company submitted plans and details required to the Committee on Streets, which approved the same, and thereupon said Company proceeded with the construction of the works of its lines and conduits, in pursuance of said sections, and completed the same within six months thereafter, and in compliance with said notification, said Company submitted to the City Engineer said plans, etc., which were approved by W. E. Cutshaw, City Engineer, immediately after which said Company proceeded with and did the necessary work to place its wires in conduits in the underground territory.

7. That from the end of the mandamus proceeding in the Supreme Court of Appeals of Virginia above mentioned, to-wit, from March 21, 1906 to January 1, 1913, the Telegraph Company complied with all of the requirements of the several ordinances of the City of Richmond hereinbefore mentioned, concerning the erection and maintenance of its poles, the stringing of its wires and the location and maintenance of conduits on and under the streets of the City of Richmond.

8. That on January 1, 1913, the said Telegraph Company refused to comply with the provisions of said ordinances and for such refusal was summoned before the Police Justice of the City of Richmond on

May 20, 1913, to show cause, if any it could, why it should not be fined for its failure to pay the charge required by section 10, Chapter 40, Richmond City Code 1910 on two certain poles located on the streets of the City of Richmond, used but not owned by it, between the first and fifteenth of January, 1913, and on May 21, 1913, the said

Company was fined Ten Dollars for violating said ordinance 159 and thereupon took an appeal to the Hastings Court of the

City of Richmond where the said judgment was affirmed on October 22, 1913, from which judgment of the Hastings Court the said Telegraph Company applied to the Supreme Court of Appeals for and obtained a writ of error and supersedeas on January 21, 1914, and on November 18, 1914, the said writ of error and supersedeas was dismissed on the motion of the said Telegraph Company, which order of dismissal was on January 22, 1915, entered in the Hastings Court of the City of Richmond, all of which proceedings will fully appear by reference to an official copy of the proceedings of the said Hastings Court and of the Supreme Court of Appeals of Virginia, filed as Exhibit R, No. 6 with the answer of the City of Richmond in this cause, which Exhibit R, No. 6, together with the exhibits made a part of the same, and the evidence, both oral and documentary, adduced before the Hastings Court upon the hearing of the case therein, it is agreed shall be read as evidence in this cause without further proof, with the right, however, to the Telegraph Company to object to the said proceedings or any portions thereof as irrelevant to the issues in this cause.

9. That after the ending of the litigation hereinbefore last mentioned, the Telegraph Company promptly paid, without objection or protest, the license taxes and other dues to the City for the years 1913 and 1914, assessed under the ordinances of the City, the validity of which are now called in question in this case. The taxes for 1915 are larger than those of 1913 and 1914 on account of the increased number of poles within the City by recent annexation.

10. That by an ordinance approved July 19, 1915, section 13 of Chapter 40, Richmond City Code 1910, imposing penalties upon electric companies failing to comply with said Chapter was amended, which ordinance is filed as Exhibit R, No. 8 with the Answer of the City of Richmond and is to be read as evidence in the cause, subject to objections by the said Telegraph Company that the said ordinance is irrelevant.

160 11. It is agreed that there is no limitation specified by the ordinances of the City of Richmond as to the number of wires to be placed upon a pole. In many instances a pole although owned and used by one Company only, has upon it 20 or 30 wires, as in the case of the Telephone Company. In other instances, there are only two or three wires upon a pole, and these wires belong to different companies.

12. That said Telegraph Company, from the year 1904 to 1913, inclusive, paid the charges upon poles owned and used by it; a statement showing the amounts and dates of which payment and ownership of the poles on which the said Company has paid the fees is here-

with filed, marked Exhibit Agreed Facts No. 1, which is to be read and considered as part of this statement.

13. That Chapter 40, Richmond City Code 1910, concerning wires, poles, conduits, etc., in, over and under the streets of the City, is in its provisions identical with Chapter 88 of Richmond City Code, 1899, except by the addition thereto of Section 34, which is in the following language:

"34. None of the obligations, burdens and restrictions of this Chapter shall, in any manner, interfere with or destroy the rights and privileges secured to Telegraph Companies which have accepted the provisions of the Act of Congress of July 24, 1866."

And except by the additions thereto of Sections 35 to 40, inclusive.

A copy of said Chapter 40 is filed as Exhibit No. 2 with the answer of said City of Richmond in this cause.

14. That in January, 1915, four (4) poles belonging to the Postal Telegraph-Cable Company were used by other companies, from whom the City of Richmond claimed and collected a charge of \$2.00 for each pole so used.

15. The number of poles in the City owned and used in 1914 by the various companies for stringing electric wires was Twelve Thousand two hundred and fifty-seven (12,257), and the aggregate amount charged thereon under the ordinance for 1914 was 161 Twenty-Four Thousand Five Hundred and Fourteen Dollars (\$24,514.00).

16. That the Postal Telegraph-Cable Company for the year 1915 is charged with the following taxes to the City of Richmond, including the tax on poles in the territory annexed to the City in 1914:

License tax for intrastate business	\$300.00
Property tax	55.03
Charges on poles under Ordinance—owned (316) and on poles used (17), total, 333	666.00
Aggregate	\$1,021.03

17. Chapter 32 of Richmond City Code 1910, or any amendment thereof, so far as the same relate to the duties of the officers and employees of the electrical department of the City of Richmond, shall be read in evidence and considered on the hearing of this cause in the District Court and in any appellate court considering an appeal therefrom, so far as copied in briefs of counsel, or so far as appearing in the exhibits filed with the answer of the City of Richmond in this cause.

18. In addition to the inspection of poles, wires and other electrical appliances maintained in the City of Richmond, in connection with the Electrical Department, required by section 14 of Chapter 40, Richmond City Code 1910, it is made the duty of the Chief of Police to require police Captains of each district to report to him on the last Monday in November of each year that they have examined each pole in their respective districts used for the support of wires carrying electricity, whether any or all are in a safe condition, and, under

rules and regulations which the Board of Police Commissioners are authorized under the charter of the City of Richmond to prescribe, the whole police force is required "to give inspection of poles their constant attention throughout the year to the end that accidents may be averted;" and the official reports of the police department as to poles belonging to the several companies show the following amounts reported as defective for the following years: In 1910, 43 poles; in 1911, 111 poles; in 1912, 8 poles; in 1913, 1 pole; in 1914, 98 poles; and such reports were given to and filed with Superintendent 162 of the Fire Alarm and Police Telegraph Department.

19. The printed record of the mandamus case hereinafore referred to, together with the printed brief of counsel in said case, may be quoted in brief of counsel, or read and used as evidence in the District Court or any appellate Court to which this cause may be taken, for the purpose of ascertaining what issues were involved in said case, subject, however, to the right of the Telegraph Company to object to the same as irrelevant to the present case, and, therefore, inadmissible.

20. The streets and alleys of the City of Richmond are post roads under the acts of Congress on that subject. Said City does not own the fee in said streets and alleys, the ultimate fee therein belonging to the abutting owners.

21. In Section 19*g* of the Charter of the City of Richmond, appears the following provision:

"And in any action against the City to recover damages against it, for any negligence in the construction or maintenance of its streets, alleys or parks, where any person is liable with the city for such negligence, every such person shall be joined as defendant with the city in any action brought to recover damages for such negligence, and where there is a judgment or verdict against the city, as well as the other defendant, it shall be ascertained by either the court or the jury, which of the defendants is primarily liable for the damages assessed."

22. The Postal Telegraph-Cable Company is engaged in the business of receiving, transmitting and delivering telegraphic messages, and has duly accepted the provisions of the Act of Congress, adopted July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes."

23. That said Company is engaged in interstate commerce, and also as a telegraph agency for the Government of the United States, and that the wires and poles (owned or used) and the equipment of said Company located in the City of Richmond are used in such occupation.

24. The population of the City of Richmond, according to the United States Census of 1910, was 127,628, and that according to a bulletin issued by the U. S. Census Bureau, its population for the year 1915 is 154,674.

25. From the reports made by the several companies in January, 1915, to the City Engineer, under section 9 of said Chapter 40, Richmond City Code, 1910, the following facts appear:

(a) The Postal Telegraph-Cable Company owns in said City 316 poles, on which the ordinance imposes a charge against said Company of.....	\$632.00
Said Company uses in said City 17 poles owned by others, on which use the ordinance imposes a charge of.....	34.00
(b) The Western Union Telegraph Company owns in said City 57 poles, on which the ordinance imposes a charge upon said Company of.....	114.00
Said Company uses in said City 155 poles owned by others, on which use the ordinance imposes a charge against said Company of.....	310.00
(c) The Va. Railway & Power Company owns in said City 5,947 taxable poles, on which the ordinance imposes a charge against said Company of.....	11,894.00
Said Company uses in said City poles owned by others, upon which use the ordinance imposes a charge against said Company of (236).....	472.00
(d) The Ches. & Potomac Telephone Co. owns in said City 5,446 poles, on which the ordinance imposes a charge against said Company of.....	10,892.00
Said Company uses in said City 41 poles owned by others, upon which use the ordinance imposes a charge against said Company of.....	82.00
(e) The American Telephone & Telegraph Company owns 42 poles in said City, on which the ordinance imposes a charge of.....	84.00

The aforesaid sums aggregate an annual charge of about \$24,-514.00.

There are in the City of Richmond 11,808 poles used for the purpose of stringing electrical wires, subject to the charges prescribed by said ordinance.

26. The City of Richmond for its telephone fire alarm and police telegraph system uses 1,711 poles of the Chesapeake & Potomac Telephone Company, 425 poles of the Virginia Railway and Power Company, and 498 poles of the Postal Telegraph-Cable Company, and said City uses for its electric plant distribution system 2,040 poles of the Virginia Railway and Power Company, and 26 poles of the Richmond and Henrico Railway Company.

27. The money derived from the said taxes upon poles is not kept as a separate fund, but is paid into the Treasury of the City and becomes a part of the general fund of the City.

28. That the City of Richmond employs no additional servants, or agents, or officers for the sole inspection of or any other attention to the poles, wires or conduits of the Telegraph Company located within said City. That the poles and conduits are located at such places and in such manner as has been directed by the City, and are so located as to interfere as little as practicable with travel or traffic, or other reasonable use of the streets of said City.

It is also stipulated and agreed that the annexed statements of Robt. J. Hall and Edward Reynolds, marked Exhibit Agreed Facts

No. 2, may be considered as evidence offered by the Telegraph Company, the City of Richmond waiving objection thereto on account of the form in which introduced, but not waiving its right to claim that the facts therein stated are irrelevant to this proceeding, and therefore, inadmissible.

It is also stipulated and agreed that on the 1st day of November 1914, the corporate limits of the City of Richmond were extended and that by virtue of such extension 3681 telegraph and telephone poles were brought within the corporate limits of the City of Richmond and became chargeable with all the fees and taxes assessed against telegraph and telephone poles by the ordinance of said City and that of such poles so brought within the corporate limits of said City the Postal Telegraph-Cable Company owns 124, and uses none of those owned by others.

It is also stipulated and agreed that in lieu of taking additional testimony in this cause, any Court hearing this cause, or any appeal therein, shall consider the testimony of witnesses Wm. H. Thompson, W. H. Joyner, George Thomas Hutt, Louis Werner, George E. Pollock, George S. Crenshaw, W. A. Barfoot, A. S. Wright, and

George W. Epps, as contained in Exhibit No. 6, filed with 165 the answer of the City of Richmond to the bill in this cause, as testimony regularly given in this cause; and the testimony of said witnesses, though given in 1913, is agreed to be applicable to and to represent the matters therein referred to as done or existing at the time of making this stipulation, except in so far as other evidence in this stipulation agreed on shows to the contrary.

JNO. N. SEBRELL, Jr.,

Counsel for Postal Tel. Cable Co.

H. R. POLLARD,

City Atty., for City of Richmond.

Mar. 31st, 1916.

Supplemental Statement of Agreed Facts "Z."

Filed October 30th, 1916.

It is agreed between the parties to this litigation, by counsel, that the following are facts which may be considered a part of the record in this case, in connection with the statement of agreed facts heretofore agreed on by such parties.

1. The laws of the State of Virginia contain the following provisions, among others, relating to telegraph companies:

Va. Code 1904, Sec. 1294*h*, sub-sec. (1) —

"(1) Every telegraph and every telephone company incorporated by this or any other State, or by the United States, may construct, maintain, and operate its line along and parallel to any of the railroads of the State, and shall have authority to occupy and use the public parks, roads, works, turnpikes, streets, avenues, and alleys in any of the counties, with the consent of the board of supervisors

thereof, or in any incorporated city or town, with the consent of the council thereof, and the water-ways within this State, for the erection of poles and wires, or cables, or the laying of underground conduits, portions of which they may lease, rent, or hire to other like companies: provided, however, that such poles, wires, cables, and conduits shall not in any wise obstruct or interfere with public travel, or the ordinary use of such railroads, parks, roads, works, turnpikes, streets, avenues, alleys, or waters, or damage private property without compensation therefor: and provided, also, that any such company, not incorporated by the State of Virginia, or the laws thereof, shall, as a condition precedent to the enjoyment of any right or privilege granted by this chapter, first obtain from the State

corporation commission a license to do business in this State, 166 and pay the fees and taxes imposed by law for such license:

and provided, also, that any such conduits shall be laid at such distance below the surface of any public park, road, turnpike, street, avenue, or alley, and at such distance from the outside of any gas or water main, or other conduit, already laid, under the said public park, road, turnpike, street, avenue, or alley as may be prescribed by the proper municipal or county authorities: and provided, further, that the said poles, wires, or cables shall not in any way obstruct the navigation of any stream, or impair or endanger the use thereof by the public, or by any person or corporation entitled to the use of the same: and provided, also, that the consent of the board of supervisors of the county or the corporate authorities of the city or town, wherein it is proposed to erect such poles, wires, or cables, or to lay such conduits upon or beneath any such public park, road, turnpike, street, avenue, or alley, shall first, and as a condition precedent, be obtained before any such public park, road, turnpike, street, avenue, or alley shall be occupied or used for the works of any such company, or be disturbed, opened, or dug up for its purposes: the consent of such corporate authorities shall be by ordinance regularly adopted by the council or other governing body of such city or town, and the consent of such board of supervisors shall be by resolution regularly adopted and spread upon the minutes of the said board: that such use of the public parks, roads, turnpikes, streets, avenues, and alleys in any of the cities or towns, or counties of this State shall be subject to such terms, regulations, and restrictions as may be imposed by the corporate authorities of any such city or town, or the board of supervisors of any such county, and the portions of the surface of the parks, roads, turnpikes, streets, avenues, or alleys, or of any pavements, opened up or disturbed in erecting, repairing, or replacing such poles, wires, or cables, or in laying or repairing such conduits, shall be immediately restored to and maintained in good condition by such company: and in case of failure on the part of the company to restore and maintain the same, the corporate authorities of any such city or town, or the board of supervisors of any such county, may properly restore and maintain the same, and the costs thereof may be recovered by the city or town, or county, from the company, in any court of competent jurisdiction: and provided, also, that all posts or poles which shall

be erected by any authority in this section conferred, shall be so located as in no way to interfere with the safety and convenience of persons traveling through, on, or over said public parks, roads, turnpikes, streets, avenues, alleys, railroads, or waters; and provided, further, that all wires fastened upon posts or poles erected as aforesaid, shall be placed at the height of not less than twenty feet above all road crossings, and twenty-three feet above railroad crossings, and that no conduits shall be laid, nor posts or poles erected upon the soil or property of any person without first obtaining the consent of the owner thereof, nor shall any such wires or cables be strung across the soil, property, or premises of any person, or attached to or connected with any shade or ornamental tree, or any private building without the consent of the owner thereof; and provided, further; that no incorporated city or town shall grant to any

167 such corporation the right to erect its poles, wires, or cables, or to lay its conduits upon or beneath its parks, streets, avenues, or alleys, until it shall have first obtained, in the manner prescribed by the Constitution and laws of this State the franchise to occupy the same; and provided, further, that notwithstanding the provisions of this chapter, the corporate authorities of any city or town may impose upon any such corporation such terms and conditions, inconsistent therewith or supplemental thereto, as to the occupation and use of its parks, streets, avenues, and alleys, and as to the construction and maintenance of its works along, over, or under the same as the corporate authorities may deem expedient and proper."

"(5) It shall be the duty of every telegraph company doing business in this State to receive and transmit dispatches from and for other telegraph or telephone companies or lines, and from and for any person, upon the payment of the usual charges therefor, if such payment is demanded; to transmit the same faithfully, impartially, with substantial accuracy, as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch and for every failure to transmit a dispatch faithfully, impartially, or with substantial accuracy, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or offering to send such dispatch or to the person to whom it was addressed; provided, however, that not more than one recovery shall be had on one dispatch, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order.

It shall be the duty of every telephone company doing the business of transmitting and receiving messages for compensation in this State to receive dispatches and messages from and for other telephone or telegraph companies or lines doing the business of re-

ceiving and transmitting messages for compensation, and from and for any person; and upon the payment of the established charges therefor, if demanded, to transmit the same faithfully and impartially, and as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch or message faithfully and impartially, and for every failure to transmit a dispatch or message as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or wishing to send such dispatch or message; provided, however, not more than one recovery shall be had on one dispatch or message, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company

168 from giving preference to dispatches or messages on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order."

"(6) It shall be the duty of every telephone company, doing the business of receiving and transmitting messages for compensation, upon the arrival of a dispatch or message at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed where the same is to be forwarded.

It shall be the duty of every telegraph company, upon the arrival of a dispatch or message at the point to which it is to be transmitted, to cause the same to be forwarded by a messenger to the person to whom the same is addressed or his agent, and upon the payment of any charges due on this dispatch or message to deliver it; provided, such person or agent reside within the city or incorporated town in which such station is, or that at such point the regulations of the company require such delivery.

It shall also be the duty of such company to forward a dispatch or message promptly, as directed, where the same is to be forwarded. For every failure to deliver or forward a dispatch or message as promptly as practicable the company shall forfeit one hundred dollars to the person sending the dispatch or message or the person to whom it was addressed."

2. The Postal Telegraph-Cable Company has obtained from the State Corporation Commission a license to do business in Virginia.

3. Section 153, in Article XII, of the Constitution of Virginia, reads as follows:

"As used in this article, the term 'corporation' or 'company' shall include all trusts, associations and joint stock companies having any powers or privileges not possessed by individuals or unlimited partnerships, and exclude all municipal corporations and public institutions owned or controlled by the State; the term 'charter' shall be construed to mean the charter of the incorporation by, or under, which any such corporation is formed; the term 'transportation company' shall include any company, trustee, or other person own-

ing, leasing or operating for hire a railroad, street railway, canal, steamboat or steamship line, and also any freight car company, car association, or car trust, express company, or company, trustee or person in any way engaged in business as a common carrier over a route acquired in whole or in part under the right of eminent domain; the term 'rate' shall be construed to mean 'rate of

169 charge for any service rendered or to be rendered'; the terms 'rate,' 'charge' and 'regulation,' shall include joint rates, joint charges, and joint regulations, respectively; the term 'transmission company' shall include any company owning, leasing, or operating for hire, any telegraph or telephone line; the term 'freight' shall be construed to mean any property transported, or received for transportation, by any transportation company; the term 'public service corporation' shall include all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term 'person,' as used in this article, shall include individuals, partnerships and corporations, in the singular as well as plural number; the term 'bond' shall mean all certificates, or written evidences, of indebtedness issued by any corporation and secured by mortgage or trust deed; the term 'frank' shall be construed to mean any writing or token, issued by, or under authority of, a transmission company, entitling the holder to any service from such company free of charge. The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

1. Section 156, in Article XII, of the Constitution of Virginia, reads in part as follows:

"(a) Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State. The commission shall prescribe the forms of all reports which may be required of such corporations by this Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in statistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law."

"(b) The commission shall have the power, and be charged with

the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company. Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company, or companies, by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length,

for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate

171 thereon by general laws; provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, so far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons."

5. On December 18, 1916, the State Corporation Commission, in the proceeding entitled "Commonwealth of Virginia at the relation of the State Corporation Commission vs. Western Union Telegraph Company and Atlantic Postal Telegraph Cable Company," entered an order prescribing and fixing the telegraph rates in the State of Virginia, in the following language:

"In this proceeding the two defendant Companies, Western Union Telegraph Company and Atlantic Postal Telegraph Cable Company, appeared before the Commission on the first day of August, 1906, and filed, respectively, separate written answers. The said answers having been carefully considered by the Commission, the Commission is of opinion that in fixing and prescribing a rate for transmitting intrastate telegraphic messages, the Commission is in the exercise of proper State authority, and that such exercise of authority is not in conflict with any of the provisions of statutes of the Federal Congress or of the Constitution of the United States relative to post roads or intrastate commerce, referred to in said answers. The Commission is of the opinion that the rates now fixed and prescribed are just, reasonable and valid, and it is, therefore, ordered as follows:

In receiving, transmitting and delivering telegraphic messages in Virginia, the Western Union Telegraph Company and Atlantic Postal Telegraph Cable Company shall observe and conform to the following rates and requirements, now fixed, prescribed and ordered by the Commission, viz:

Except as may be otherwise specifically provided at any time by the State Corporation Commission, neither of the said two telegraph companies shall collect, for the service over its line between any two points within this State, more than twenty-five cents for transmitting a message of ten words, or less, exclusive of date, address and signature, nor more than two cents for each additional

word in a day message, nor more than one cent for each additional word in a night message. Whenever a message is transmitted over the lines of both of said companies in order to reach destination, neither of said companies shall charge or collect more than 172 forty (40) cents for the service of itself and the connecting telegraph company in transmitting a message of ten words or less, exclusive of date, address and signature, between any two points within this State, nor more than three cents for each additional word.

Messages shall be received for transmission, and delivered at destination, as now provided by statute, until other provision is made therefor.

Both of said companies shall forthwith, by proper directions to their officers and agents in accordance with the course of business of each Company, properly provide at once for putting into effect the foregoing rates and requirements, the same to take effect on the first day of January, 1907, after which date any rate or provisions in conflict with the said rates and order now fixed and prescribed by the Commission shall be unlawful and void.

"This order shall not be construed to infringe upon any right of the said companies under the Constitution and laws of the State of Virginia, or the Constitution and laws of the United States."

JNO. N. SEBRELL, Jr.,

Counsel for Postal Tel.-Cable Co.,

H. R. POLLARD, *City Atty.,*

Counsel for City of Richmond,

Sept. 20, 1916.

Conclusions of Court.

Filed January 9th, 1917.

WADSWILL, *District Judge:*

This cause is now before the court upon its merits, having been elaborately argued, orally and in writing, some time since, and submitted for final determination.

The conclusion reached by the court is that the complainant is not entitled to the injunction prayed for, or the relief sought, either as respects the license charge of \$300.00, annually assessed by the defendant against it for doing intrastate business in the city of Richmond, or the charge of \$2.00 per annum for each pole used, possessed and maintained by it, in the parks, streets, lanes or alleys of the city of Richmond.

The City is clearly entitled to assess the license tax of \$300.00 against which relief is sought; and assuming \$2.00 per annum 173 for each pole, as specified in section 10 of chapter 40 of the City Code of 1910, to be high, for the purposes for which the city may lawfully make such charge, still, it cannot be said that the same is so unreasonable as to bring it within the in-

hibition of the constitution, or warrant the court in substituting its judgment for that of the proper legislative body having the power to make the assessment.

It follows that the injunction should be denied, and the bill dismissed, and a decree to that effect will be entered on presentation.

Decree Denying Injunction and Dismissing Bill.

(Final Decree.)

Entered and Filed January 26th, 1917.

This cause which was fully argued and submitted to the court on October 30 and 31, 1916, and the court not being then advised of its judgment to be rendered in the premises took time to consider thereof, now came on this day to be further heard upon the bill of complaint, with Exhibits "A" and "B" therewith filed; upon the Answer of the City of Richmond to the said Bill, with Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 filed therewith; upon Exhibits "Agreed Facts" Nos. 1 and 2; Statement of Agreed Facts marked "X" and supplemental Statement of Agreed Facts marked "Z."

On consideration whereof the court for reasons stated in writing and filed with the record January 9, 1917, doth hereby refuse to grant the injunction prayed for by the complainant in its bill, and doth adjudge, order and decree that the said Bill be dismissed and that the said Postal Telegraph-Cable Company pay to the City of Richmond its costs about its defense in this behalf expended, to be taxed by the Clerk of this Court.

EDMUND WADDILL, Jr.,

U. S. Dist. Judge.

Richmond, Va., January 26th, 1917.

Petition for Appeal.

Filed March 5th, 1917.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

Your petitioner, Postal Telegraph-Cable Company, respectfully represents as follows:

First, Your petitioner, Postal Telegraph-Cable Company, a corporation chartered, organized and existing under the laws of the State of Delaware, and a citizen and resident of the State of Delaware, is the sole plaintiff in this suit, and the City of Richmond, a municipal corporation, chartered and existing under the laws of the State of Virginia, and a citizen and resident of the State of Virginia, is the sole defendant in this suit.

Second, Your petitioner, Postal Telegraph-Cable Company, filed its bill in equity in this cause, together with the exhibits accompany-

ing the same, in the District Court of the United States for the Eastern District of Virginia on the 15th day of June, 1915; that said bill was duly matured against the defendant, and your petitioner, without attempting to go into details, refers to the record for the purpose of showing said bill and all other pleadings, and all orders, proceedings, stipulations, depositions, exhibits and decrees in this cause.

Third. That on the 26th day of January, 1917, the said Court made and signed a final order by which it refused to grant the
175 injunction prayed for in complainant's bill, and dismissed your petitioner's bill with costs.

Fourth. Your petitioner respectfully submits that the District Court erred in making and entering its said decree of January 26th, 1917, by which (a) it refused to grant the injunction prayed for in said bill, and (b) dismissed your petitioner's bill with costs.

Fifth. Your petitioner, conceiving itself aggrieved by the said decree of said District Court, made and entered on the 26th day of January, 1917, hereby appeals from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed, and that a supersedeas may be awarded to operate to stay further proceedings by the defendant against the said plaintiff during the pendency of this appeal; that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that said decree, bearing date January 26th, 1917, may be reviewed and reversed by the Supreme Court of the United States and that your petitioner may be given such further relief as may be proper in matters of this character.

POSTAL TELEGRAPH-CABLE COMPANY.

JNO. N. SEBRELL, Jr., *Solicitor*.

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Assignments of Error.

Filed March 5th, 1917.

The Postal Telegraph-Cable Company respectfully says that the decree made and entered in this cause on the 26th day of January, 1917, refusing the injunction and dismissing the bill of the Postal Telegraph-Cable Company is erroneous, and hereby assigns as error in the making and entry of said decree the following, to-wit:

First. That the Court erred in dismissing said bill, whereas the court should have granted to the complainant therein the relief asked for by it.

Second. That said decree is erroneous in that it adjudged Chapter fifteen (15) of Richmond City Code, 1910, to be valid and constitutional, and erred in failing to hold that the said section specified in the bill is unreasonable and repugnant to the Acts of Congress and the constitutional provisions enumerated and set forth in said bill.

Third. That said decree is erroneous in that it holds that Section fifteen A (15-A) of Chapter fifteen (15) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Constitu-

tion and laws of the United States enumerated and set forth in said bill.

Fourth. That said decree is erroneous in that it holds that Chapter forty (40) of the Richmond City Code, 1910, to be valid and constitutional and erred in failing to hold that each of the several sections specified in the bill is unreasonable and repugnant to the Act of Congress and the constitutional provisions enumerated and set forth in said bill.

Fifth. That said decree is erroneous in that it holds that 177 Section ten (10) of said Chapter forty (40) of Richmond

City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

Sixth. That said decree is erroneous in that it holds that Section eleven (11) of said Chapter forty (40) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

Seventh. That said decree is erroneous in that it holds that Section twelve (12) of said Chapter forty (40) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

Eighth. That said decree is erroneous in that it holds that Section thirteen (13) of said Chapter forty (40) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

Ninth. That the decree is erroneous in that it did not award to the plaintiff an injunction against the enforcement of the ordinances, and of the several provisions thereof, and each of them, heretofore enumerated as unreasonable and unjust.

Wherefore, complainant asks that the said decree may be reversed and it restored to all things which it has lost by reason thereof.

POSTAL TELEGRAPH-CABLE COMPANY.

JNO. N. SEBRELL, Jr., *Solicitor.*

178 *Order Allowing Appeal and Fixing Amount of Appeal Bond.*

Entered and Filed March 5th, 1917.

This day the Postal Telegraph-Cable Company presented its petition for the allowance of an appeal in the above entitled action to the Supreme Court of the United States, which prayer for an appeal is hereby allowed, conditioned upon said Postal Telegraph-Cable Company giving an appeal bond in the sum of One Thousand Dollars, the same to be approved by a Judge of this Court.

EDMUND WADDILL, Jr.,

United States District Judge.

Richmond, Va., March 5th, 1917.

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Appeal Bond.

Executed, Approved and Filed March 7th, 1917.

Know all men by these presents, that we Charles H. Asburn as principal, and the National Surety Company, as surety are held and firmly bound unto the City of Richmond in the sum of one thousand Dollars (\$1000.00), in lawful money of the United States, to be paid to the said City of Richmond for which payment, well and truly to be made, the said Charles H. Asburn binds himself, his heirs, executors and administrators, and the said National Surety Company, binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals and dated this 7th day of March, 1917.

Whereas, lately at a District Court of the United States for the Eastern District of Virginia in a suit depending in said Court between the Postal Telegraph-Cable Company, a corporation, complainant, and the City of Richmond, a municipal corporation, defendant, a decree was rendered against the said Postal Telegraph-Cable Company, the complainant, and the said Postal Telegraph-Cable Company, the complainant, having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said City of Richmond, a municipal corporation, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the day in the said citation mentioned:

Now, the condition of the above obligation is such, That if the said Postal Telegraph-Cable Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES H. ASHBURN. [SEAL.]

NATIONAL SURETY CO., [SEAL.]

By L. V. HINNANT, *Atty. in Fact.*

180 Sealed and delivered in the presence of,
JOSEPH P. BRADY,
Clerk United States District Court.

Approved by,
EDMUND WADDILL, Jr.,
United States District Judge.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to City of Richmond, a Municipal Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington on

88 of the said Code, which are the same as the Richmond City Code 1910 Chapter 40, which applied to the matters mentioned in the said petition and which required the complainant to submit plans and details showing the location, plant, size, construction, and materials, of its poles and conduits in the streets and alleys of the city were unreasonable and contrary to the constitution and laws of the

United States; and that sections 10 and 13 were also void, the
182 respondent saying with reference thereto:

"Section 10 of said ordinance provides among other things, that all persons and corporations shall annually pay to the Treasurer of the City of Richmond a fee of two dollars (\$2.00) for each and every telegraph pole used, possessed or maintained, by them in any of the parks, streets, lanes or alleys of the City of Richmond, and your respondent submits that this fee or tax is a gross violation of the rights and privileges of your respondent under the aforesaid provisions of the Constitution of the United States and the amendments thereof and the aforesaid Acts of Congress, and is an unreasonable, unwarranted and illegal burden upon your orator and its foreign and interstate commerce and is repugnant to the aforesaid constitutional and statutory provisions. Furthermore your respondent avers that said fee and tax of two dollars per pole per annum is enormously more than could be charged under any lawful form of taxation or for the expenses of supervision by said City of Richmond or by both combined. That said pole tax is very largely increased by the requirement of Section 10, that each user of the same pole is required to pay a separate tax of \$2.00 per annum on each pole so used.

Section 13 of said ordinance provided that any corporation using possessing or maintaining any telegraph poles in any of the streets, lanes or alleys of the City of Richmond who shall have failed by the 20th day of January of each and every year to pay a fee of two dollars (\$2.00) on each pole shall be liable to a fine of not less than five nor more than one hundred dollars for each pole upon which it is in default, and that each day of default shall be a separate offense, and that such fines may be imposed by the Police Justice of the City of Richmond."

On the issues made by the said petition and answer much evidence was taken and the said case came on to be heard before the Supreme

Court of Appeals of Virginia at Richmond on the 23rd day
183 of November, 1905, and was fully argued by counsel on both sides and submitted to the court for determination, but before any determination had been made, on motion of the City of Richmond, with the consent of the respondent (the complainant herein), the case was dismissed, the parties thereto having entered into an agreement which is Exhibit 4 with the defendant's answer in this case.

3. Exhibits "Agreed Facts," numbers One and Two; statement of Agreed Facts marked "X" and supplemental statement of facts marked "Z."

4. The opinion of the District Court dated and filed on the 9th day of January, 1917.

5. The final decree of the District Court dated on the 26th day of January, 1917.

6. The papers and proceedings for the taking and removing of this cause to the Supreme Court of the United States on appeal, including the petition for appeal, assignments of errors, bond with the approval of the court thereon, citation, the order allowing appeal, etc.

H. R. POLLARD,
Solicitor for the Defendant.
JNO. N. SEBRELL, JR.,
Solicitor for the Plaintiff.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a true transcript of the record and proofs made in accordance with stipulation of counsel, as appears herein,
184 in the cause of Postal Telegraph-Cable Company, Complain-
ant, versus City of Richmond, Defendant, In Equity No.
17.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at the City of Richmond, Virginia, this 31st day of March, A. D. 1917.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
*Clerk of the District Court of the United States
for the Eastern District of Virginia.*

Endorsed on cover: File No. 25,891. E. Virginia D. C. U. S. Term No. 469. Postal Telegraph-Cable Company, appellant, vs. City of Richmond. Filed April 7th, 1917. File No. 25,891.

14

Office Supreme Court, U. S.
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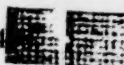
JAMES D. MAHER,

CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 4



169

POSTAL TELEGRAPH CABLE CO., APPELLANT,

vs.

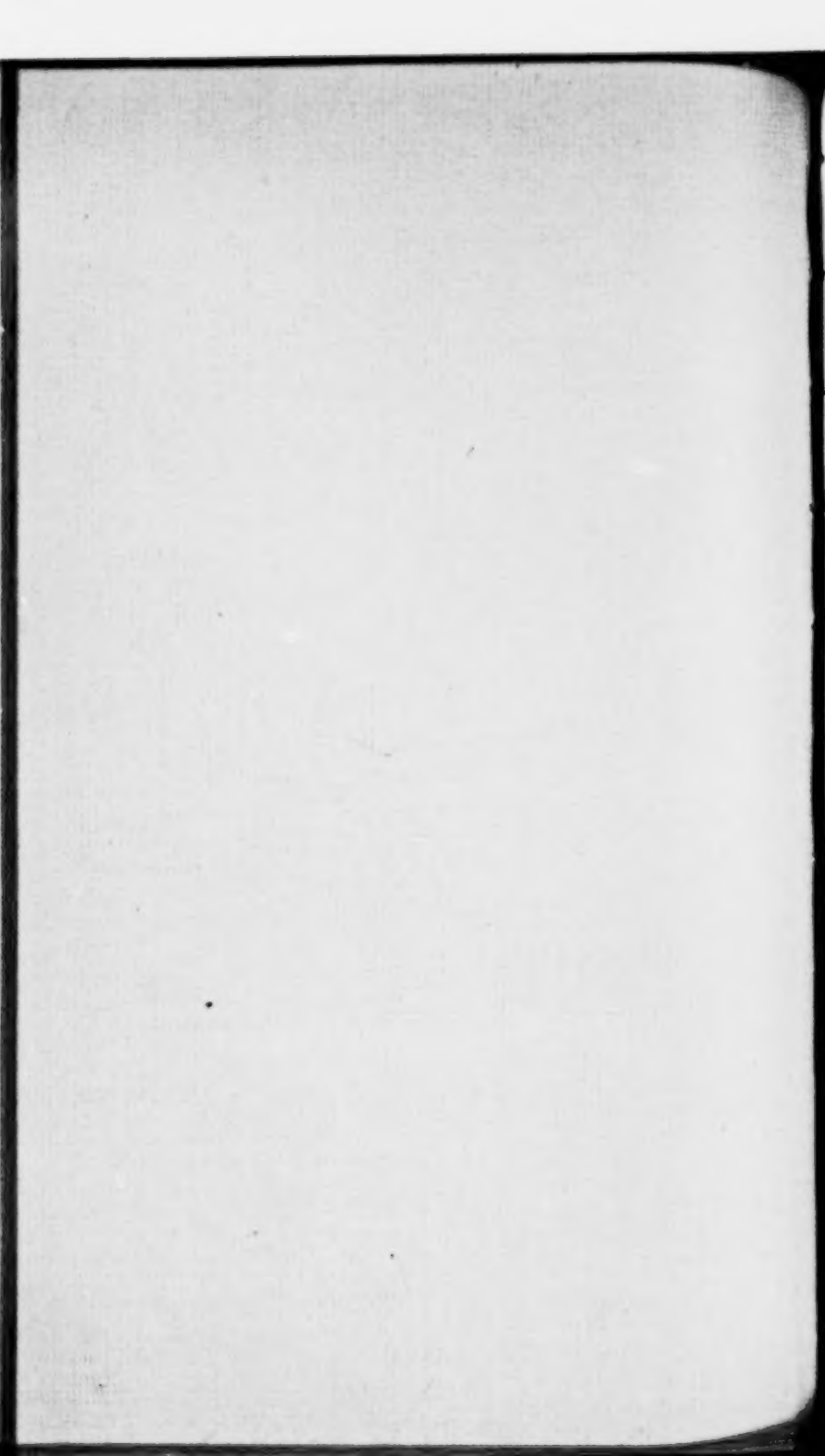
CITY OF RICHMOND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA.

**NOTICE AND MOTION ON BEHALF OF DEFENDANT TO
DISMISS OR AFFIRM.**

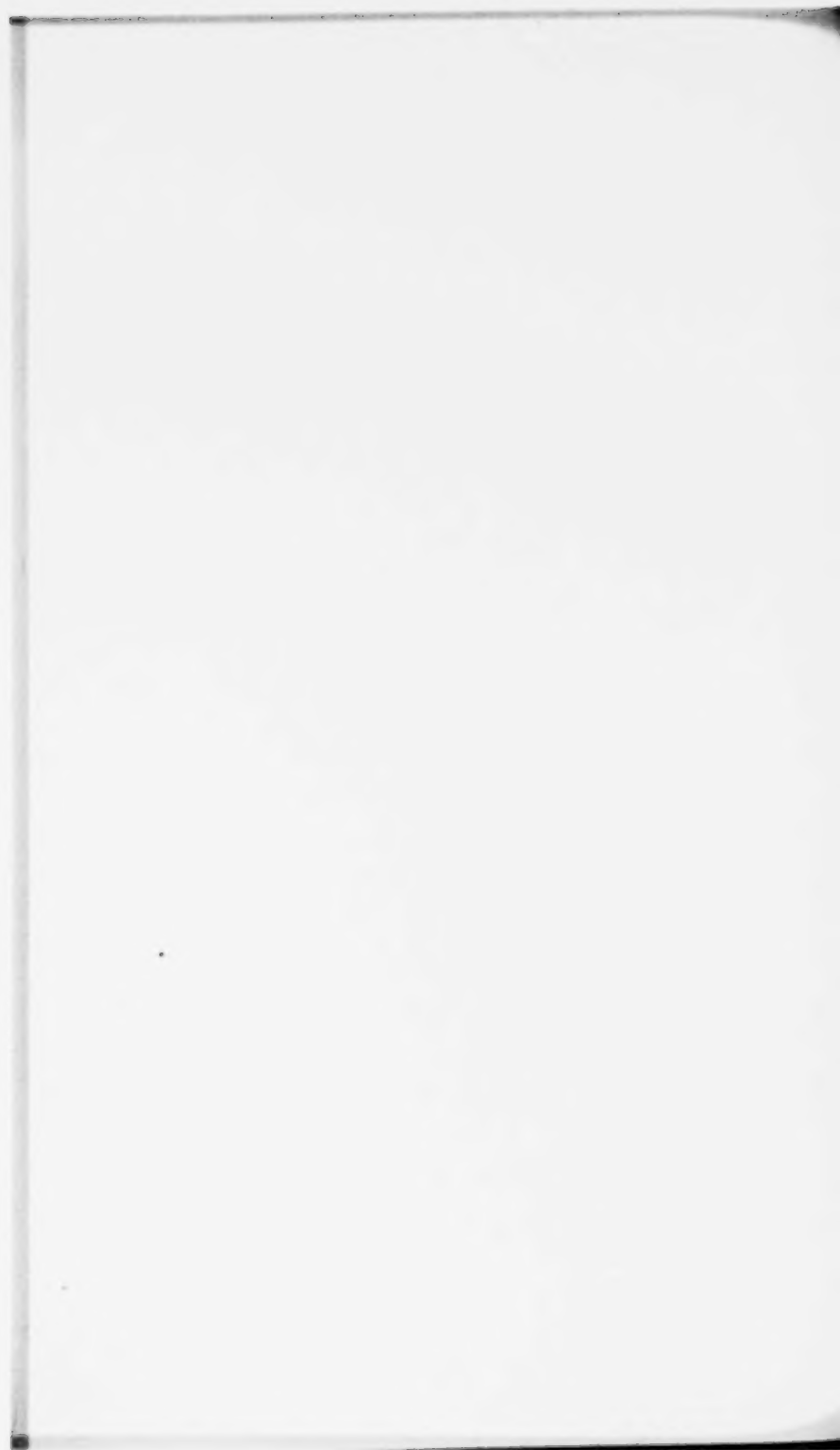
AND BRIEF IN SUPPORT OF SAME

H. R. POLLARD,
City Attorney and Solicitor for Defendant.



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Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 469.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT.

versus

CITY OF RICHMOND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA.

NOTICE.

To Mr. John N. Sebrell, Jr.,

Attorney and Solicitor for the Postal Telegraph-
Cable Company:

TAKE NOTICE that on the 29th day of April, 1918, at 12 o'clock, noon, or as soon thereafter as counsel can be heard, the City of Richmond, appellee in the above cause, will move the Supreme Court of the United States to dismiss or affirm said cause, for the reason that it is manifest that the appeal was taken for delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

CITY OF RICHMOND,

By Counsel.

H. R. POLLARD,

City Attorney and Solicitor
for the City of Richmond.

Legal service of notice of the above motion is hereby accepted this ——— day of March, 1918.

Attorney and Solicitor for
Postal Telegraph-Cable
Company.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 469.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT.

versus

CITY OF RICHMOND.

**MOTION OF THE DEFENDANT TO AFFIRM OR DISMISS.
AND BRIEF IN SUPPORT OF MOTION**

The City of Richmond moves the court to affirm or dismiss the above entitled cause for the reason that it is manifest that the appeal was taken for delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

The bill in equity in this case was filed in the District Court of the United States for the Eastern District of Virginia (Record, p. 2-9). The *gravamen* of this bill is that the City of Richmond exacts of the complainant an annual license fee of \$300 and in addition a "tax or fee of two dollars (\$2.00) for each pole used, possessed or maintained by the said company" located in the streets, alleys and other public places of the City within the corporate limits of said City.

Concerning the ordinance which provides for such annual license tax and fee of \$2.00 it is alleged that the same "are illegal and void because they, and each of them, are designed and intended to provide revenue from this form of taxation for the general expenses for the City of Richmond, and that no other object than this exists or has at any time existed for the exaction of the large sum of money imposed by the said ordinances and each of them," and concerning which charges it is further alleged that the same are "grossly excessive, and that if every town or city in the State of Virginia in which the complainant company maintains an office should pass similar ordinances the total amount exacted from the complainant would exceed ten thousand dollars," etc. (Fourth Clause of Bill, Record, p. 3.)

And by the next clause in the bill it is alleged that the complainant company is engaged in *interstate commerce* and that if said charges are enforced "it will be destructive of the rights of this complainant corporation to maintain an office in the City of Richmond for the transaction of the business for which it was chartered," etc.

The next and sixth clause of the bill is an attempted demonstration by figures concerning the earnings and expenses of the complainant to show that the exactions aforesaid are *confiscatory and therefore illegal and void*.

In the ninth and last charge made in the bill the complainant attempts to show that the *finer prescribed in the ordinances* complained of are *so excessive* as they

would "*absolutely confiscate the business and property of the company in this State, and would require complainant to remove from the State and abandon its business here,*" etc. (Record, p. 8.)

The prayer of the bill is that a temporary injunction may be granted restraining the City of Richmond and its officers "*from interfering with the business of the said complainant * * * with respect to the collection of the said license or taxes,*" and further praying that upon a final *hearing* of the cause such injunction may be made "*perpetual.*"

On September 22, 1915, by leave of the court, the defendant filed its answer to the Bill of Complaint by which the *absolute right* of the complainant company to operate and conduct its telegraph business in the City of Richmond under the Act of Congress approved July 24, 1866, *was denied*, such right being, as alleged in said answer, "*only a permissive right to maintain and operate its lines of telegraph over and along said streets and alleys within the City of Richmond under a special contract*" with the City of Richmond, and that such contract grew out of the acceptance by the complainant "*of the provisions of an ordinance of the Council of the City of Richmond, approved March 16, 1889,*" an official copy of which was filed with said answer as Exhibit R. No. 1 (Record, p. 20), the same being passed by the Council of the City of Richmond in pursuance of the Act of the General Assembly approved February 10, 1880, incorporated in the Code of Virginia, 1887, as Section 1287, and also in pursuance of Sections 19, 19g and 19h of the Charter of the City of Richmond, and also more especially subject to "*all regulations and restrictions that the City of Richmond may impose in the proper and lawful exercise of the police power.*"

Concerning the illegality of the charge of \$300 "*for the privilege of doing business within the City of Richmond, but not including any business done to or from points within the State, and not including any business*

done for the government of the United States, its officers or agents" and the charge of a rental (not a tax) of \$2.00 for each pole used, possessed or maintained by the company, that the ordinances imposing said charges were unreasonable, unjust and excessive and are therefore illegal and void, denied the truth of such charges and alleged that that question had been "the subject of judicial investigation and determination in litigation between the complainant and the respondent," and that therefore "further inquiry concerning the same is precluded," and in connection therewith filed certain documentary evidence to sustain the contention of the City of Richmond, to which evidence the attention of the court will be specially called.

And in addition denied all of the allegations of the complainant's bill charging that the ordinances of the City of Richmond which imposed the license tax of \$300 upon the complainant for doing *intrastate* business in the City of Richmond and requiring the payment of a rental or fee of \$2.00 per pole for every pole used, possessed or maintained by the complainant and located on the streets of the City of Richmond were illegal and void as charged in its bill. In lieu of parol evidence being taken by the parties, by stipulation certain affidavits were filed and documentary evidence produced and made parts of the record, which will be found in the Record, pages 22-123.

On the hearing of the cause the District Court on January 9, 1917, refused the injunction prayed for and ordered the complainant's bill to be dismissed, filing its conclusions in the following language:

"CONCLUSIONS OF COURT.

Filed January 9th, 1917.

WADDILL, District Judge:

This cause is now before the court upon its merits, having been elaborately argued, orally and

in writing, some time since, and submitted for final determination.

The conclusion reached by the court is that the complainant is not entitled to the injunction prayed for, or the relief sought, either as respects the license charge of \$300, annually assessed by the defendant against it for doing intrastate business in the City of Richmond, or the charge of \$2.00 per annum for each pole used, possessed and maintained by it, in the parks, streets, lanes or alleys of the City of Richmond.

The City is clearly entitled to assess the license tax of \$300 against which relief is sought; and assuming \$2 per annum for each pole, as specified in Section 10 of Chapter 40 of the City Code of 1910, to be high, for the purposes for which the City may lawfully make such charge, still it cannot be said that the same is so unreasonable as to bring it within the inhibition of the constitution, or warrant the court in substituting its judgment for that of the proper legislative body having the power to make the assessment.

It follows that the injunction should be denied, and the bill dismissed, and a decree to that effect will be entered on presentation." (Record, 123-4.)

And on January 26, 1917, the court entered the following order:

"This cause which was fully argued and submitted to the court on October 30 and 31, 1916, and the court not being then advised of its judgment to be rendered in the premises, took time to consider thereof, now came on this day to be further heard upon the bill of complaint, with Exhibits 'A' and 'B' therewith filed; upon the answer of the City of Richmond to the said bill, with Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 filed therewith; upon Exhibits 'Agreed Facts,' Nos. 1 and 2; Statement of Agreed Facts marked 'X,' and supplemental Statement of Agreed Facts marked 'Z.'

"On consideration whereof the court for reasons stated in writing and filed with the record January 9, 1917, doth hereby refuse to grant the injunction

prayed for by the complainant in its bill, and doth adjudge, order and decree that the said bill be dismissed and that the said Postal Telegraph-Cable Company pay to the City of Richmond its costs about its defense in this behalf expended, to be taxed by the Clerk of this Court."

(Signed) EDMUND WADDILL, JR.,
U. S. Dist. Judge." (Record, 124.)

The motion now submitted to dismiss or affirm rests upon the four grounds following:

FIRST: That the constitutionality and legality of the imposition of the annual license fee of \$300 against the complainant company for doing intrastate business in the City of Richmond and the rental charge of \$2 per pole for each pole owned, used and maintained by it, is *stare decisis*, and therefore further investigation on this subject between the complainant and the defendant City is precluded.

The doctrine invoked under this head is embodied in the maxim *stare decisis et non quieta movere*.

Of this doctrine it is said:

"The principle embodied in the maxim has been for centuries recognized and acted upon in English law. As early as A. D. 1454 there was a judicial declaration as to the necessity of respecting the authority of decided cases. The doctrine of *stare decisis* owes its origin and observance to the recognition of the necessity for stability and uniformity in the construction and interpretation of the law. It is too evident to require discussion that the interests of the State and of the individual and the proper administration of justice require that there should be settled rules in these matters. The application of the doctrine necessarily cannot be ac-

ording to fixed rules, but must be determined in each case by the discretion of the court. It has been stated that decided cases bear the same relation to the science of the law that a convincing series of experiments bear to any other branch of inductive philosophy. They are, on being promulgated, immediately relied upon according to their character, either as confirming an old or forming a new principle of action. They are continually multiplying throughout the whole extent of the court's jurisdiction and form the basis of a claim to numerous and valuable rights, offensive and defensive. The doctrine, as its name shows, has only to do with direct and controlling decisions, especially precedents for future cases, involving the same or similar issues. Its application is in no way affected by dicta." (26 Am. & Eng. Ency. L., p. 160-1.)

In the case of *Western U. T. Co. v. Goddin*, 94 Va. 513, 515, it was said:

"At the time the writ of error in the case before us was awarded, the constitutionality of Section 1292 had been twice passed upon in this court, and it was no longer a debatable question. The test of good faith does not fully meet the difficulty. Counsel and parties may, with perfect good faith, ask the reiterated judgment of this court upon any question, and we do not clearly perceive how this court could say at just what point the appeal to it was wanting in good faith. A better test, perhaps, is to be found in considering whether or not the point presented is any longer open for argument. Is it a debatable question? See 2 Ency. of Plead. & Pr., p. 40-41; *Virden v. Allen*, 107 Ill. 505; *Chaplin v. Highway Commissioners*, 126 Ill. 264. Applying this test, it is plain that the constitutionality of Section 1292 is not an open one in this court. It is no longer 'debatable.' "

In *Wright v. Sills*, 2 Black 544, 545, it was said:

"Whatever difference of opinion may have existed in this court heretofore in regard to these questions, or may now exist, if they were opened for

reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhaustive in the earlier cases. It can subserve no useful purpose again to examine the subject. The decree of the court below is affirmed." See also *Western U. Tele. Co. v. Reynolds*, 100 Va. 459, 467.

And, again in *Minnesota, etc., Co. v. National, etc., Co.*, 3 Wall. 332, 334, it was said by Mr. Justice Grier:

"Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgments."

By reference to the opinion of Goff, J., in *Western Union Telegraph Company v. City of Richmond*, 178 Fed. 310, it will be seen that the Western Union Telegraph Company in that case charged in its bill "that said ordinance (the ordinance in question in the instant case), each and every section thereof, and all amendments thereto, are unreasonable, unjust, illegal and void," and elaborating said allegations alleges specifically that the license fee of \$500 and the imposition by Section 10 of said ordinance of a rental charge of \$2 per pole, for every pole owned, used or maintained by it are enormously more than could be legally imposed under any right held by the defendant to make charges for local purposes, etc., and is a gross violation of its rights and privileges and an unreasonable burden upon foreign and interstate commerce. The prayer of the bill being that the City of Richmond be restrained from enforcing the provisions of any of the sections of the Chapter of the City Code complained of. It thus appears that the bill in that case and this case are substantially the same. The learned Judge, Goff, in the Circuit Court in dismissing the complainant's bill said:

"That complainant was not given permission by the Congress, to occupy the streets of the City of Richmond, *without paying its fair proportion of the taxes required to maintain the government of that city*, and without being required to submit to all reasonable regulations provided for by its Council, has been so often announced by the courts, as to justify the suggestion that questions relating to such matters might well be considered as disposed of. However, in deference to the earnest insistence of able and experienced counsel I refer to a few of the decisions of the Supreme Court of the United States. In *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 100, that court said: 'It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights.' "

The learned Judge continuing cites and quotes striking passages from *Atlantic Tel., etc., Co. v. Philadelphia*, 190 U. S. 160, *Richmond v. Southern Bell, etc., Co.* 174 U. S. 761, and *Western Union Tele. Co. v. Massachusetts*, 125 U. S. 530.

And at page 324, in concluding his able opinion, the learned Judge (Goff) says:

"While it is true that the City cannot impose a tax upon the franchises of the company, as that would be a burden upon interstate commerce, *still it can make a reasonable charge for the use of its property, in which all the public are interested; and if the complainant occupies any of such property there is no reason why it should not pay a reasonable rent for it*, as all citizens and all other corporations do for a like use. It is not a tax in the sense in which that word is ordinarily used, but is in the nature of a special toll, imposed for a specific use of designated property by a particular party. The poles deprive the city and the public of the use of certain portions of the streets, and frequently necessitate the excavation, repair and inspection of the same,

causing expense to the city and inconvenience to the public. A toll of two dollars per pole per annum might be an unreasonable charge along a country highway, but in a thickly settled section, like the streets of the City of Richmond, where many people for various purposes make continuous use of them, the sum of two dollars per year for such use per pole seems entirely proper and reasonable. * * *

"My conclusion is that complainant has not been deprived of any of the rights to which it is entitled under the laws and Constitution of the United States, and that no unreasonable rules and regulations have been provided by the ordinance complained of, or by any of its sections, for conducting the business of the complainant in the City of Richmond."

What was said by Mr. Justice Holmes in affirming the holding of Judge Goff in this case (*Western Union Telegraph Co. v. City of Richmond*, 224 U. S. 171-2) concerning the validity of Sections 10 (Record, 25) and 32 (Record, 32) of the ordinance of the City of Richmond, is not only pertinent but conclusive, if the doctrine of *stare decisis* is to prevail. He there says:

"The money charges of \$2 per pole and the same sum per mile of underground wire are found fault with. Many of the cases relied upon by the appellant are cases turning on the limitations to the powers of the municipality. But, as we have said, this bill is brought on the theory that any such legislation by the State would be bad under the Constitution and Act of Congress—not upon the suggestion that the City of Richmond is acting *ultra vires*. If the City could be authorized to do what it has done, we must assume that it is acting within its powers. Taking up the question so limited, we agree with the court below that after the appellant, as is found, has paid the charges without complaint, for many years, it would require something more than a protest now to induce us to find it unreasonable. The sum is not so great as has been charged and sustained heretofore. *St. Louis v. Western Union Tele. Co.*, 148 U. S. 92; *Postal Tele-Cable Co. v. Baltimore*, 156

U. S. 210, and *Memphis v. Postal Tele.-Cable Co.*, 164 Fed. 600."

This Honorable Court cannot be unacquainted with the persistency of the appellant in urging in this tribunal, as well as in inferior tribunals, in many States of the Union, the claim that similar charges to those made by the ordinances of the City of Richmond, some larger in amount and some smaller, are unreasonable and therefore illegal and unconstitutional, as interfering with interstate commerce. Among these the *Postal Telegraph-Cable Co. v. Baltimore*, 79 Md. 502, is notable. There the charge was \$5 per pole for the use of the streets of the City of Baltimore. Dissatisfied with the judgment of the Supreme Court of Maryland, the case was appealed to this Honorable Court and is reported in 156 U. S. 210, where the late distinguished Chief Justice, on a motion to dismiss or affirm, made short work of the determination of the question, his opinion consisting of but one sentence, as follows: "The judgment is affirmed upon the authority of *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92."

It thus appears that as far back as 1895, when the foregoing decision was made, this Honorable Court had reached a point where it was thought that the questions presented by that record, which are practically the same as those now presented, "should be considered as settled."

In the recent case of *Western Union Telegraph Company v. Louisville and Nashville R. R. Co.*, 244 U. S. 648, a petition for writ of *certiorari* was denied, the court citing, among other cases, the *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160.

For the foregoing reasons and on the authorities cited it is insisted that the questions presented by the record are *stare decisis* and therefore the appeal should be dismissed or affirmed.

SECOND: That the long acquiescence of the complainant in the payment of the charges complained of precluded it from further contesting the legality of the ordinance.

The record shows that the complainant company obtained its right to occupy the streets, alleys and other public places of the City of Richmond for the erection of its poles and the stringing of its wires thereon, by virtue of an ordinance approved March 16, 1889. (Record, p. 20-1.)

By Section 2 of said ordinance the City Engineer was expressly authorized to determine "the quality, character, number, location, condition, appearance and manner of erection of the poles, wires and other apparatus needed for the use" of said company, and by Section 3 the permission granted was made subject at all times to the power reserved in the Council to put additional restrictions and regulations upon the erection or use of poles and wires; and by Section 4 when other restrictions or regulations were so imposed the company was required, at its own expense, to comply fully therewith; and by Section 8 the Committee on Streets was authorized to require the said Company to allow other persons or companies to place upon its poles electric wires.

Soon after the granting of the permission to the said company to occupy the streets of the City of Richmond it proceeded to erect and maintain its poles and wires along the streets and other public places of the City of Richmond.

That by an ordinance approved March 15, 1902, all telegraph, telephone and electric light and power companies maintaining overhead wires or cables along the streets of the City of Richmond were required, within certain defined limits, to place their wires underground, and on May 4, 1904, a communication was addressed to the Superintendent of the complainant company by W. E. Cutshaw, City Engineer, enclosing him a copy of said ordinance and requesting that he present plans to the

engineering department of the City of Richmond in compliance with said ordinance; but said complainant refused to comply with said provisions, and having so failed, on the 8th day of September, 1904, the City of Richmond presented to the Supreme Court of Appeals of Virginia a petition with accompanying exhibits praying the said court to grant a writ of *mandamus* commanding the said appellant "to submit to the Committee on Streets and Shockoe Creek of the Council of the City of Richmond, plans and details showing the location, plan, size, construction and material of the conduits necessary to place your (its) wires underground in the streets, alleys and public places of the City of Richmond within the territory mentioned in Section 27 of Chapter 88, Richmond City Code, 1899, as amended, and also requiring you (it) fully and completely to comply with all of the provisions of Sections 27 and 28 of said Chapter 88"; to which petition the appellant on December 21, 1904, filed its answer, by which answer said Sections 10, 11, 12 and 13 were expressly alleged to be unreasonable and unjust and therefore void, and in addition alleged that each and every section of Chapter 88 of Richmond City Code, 1899, which are the same as Richmond City Code, 1910, Chapter 40, now alleged to be unconstitutional and void, with the exception of certain amendments made to Sections 10, 27 and 28, and with the exception that Sections 34, 35, 36, 37, 38, 39 and 40 were added to said Chapter 40 of Richmond City Code, 1910, none of which amendments or additions affect the question here involved, except the added section 34, which is in the following language:

"34. None of the obligations, burdens and restrictions of this Chapter shall, in any manner, interfere with or destroy the rights and privileges secured to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1896." (Record, 14-15, 22-33.)

On the issues made by said petition and answer in said *mandamus* proceedings, much evidence was taken and the cause came on to be heard before the said Supreme Court of Appeals of Virginia at Richmond on the — day of —, 1905, and was fully argued by counsel on both sides and submitted to the court for determination, but before any determination had been made, to-wit, on the 24th day of February, 1906, *by consent of parties* the said case *was dismissed*, the said Postal Telegraph-Cable Company having agreed in writing to comply with the provisions of the said chapter (Record, 15, 33-4), and place its wires underground, all of which will fully appear by reference to a printed copy of the record and proceedings in the said Supreme Court of Appeals of Virginia and to a written agreement setting forth the terms on which said case was dismissed. (Record, 33-4; see also Stipulation of Agreed Facts marked "X," Record, p. 110-111.)

In pursuance of said agreement the said company was promptly informed of the termination of the said litigation and required to place its wires underground within the underground territory, as will appear by a communication addressed to it by Col. W. E. Cutshaw, City Engineer, dated March 21, 1906, which it promptly did. (Record, p. 34.)

From that time to January 1, 1913, the said company continued to comply with all of the requirements of Chapter 40, Richmond City Code, 1910, concerning the erection and maintenance of its poles, wires and conduits on the streets of the City of Richmond, and paid all of the charges imposed by said ordinance, until January 1, 1913, when the said company offered to pay the license tax of \$300 and a rental fee of \$2 on every pole owned by it, but refused to pay the fee of \$2 chargeable against it for the poles *not owned but used by it*, and that on such refusal proceedings were instituted before the Police Justice of the City of Richmond to impose a fine upon said company for refusing to pay the fees prescribed by Sec-

tion 10 of the ordinance, the validity of which is called in question (Record, 111-2, Agreed Facts, Clause 8), where a judgment was entered imposing a fine upon said company for such failure (Record, 49). From this judgment an appeal was taken to the Hustings Court of the City of Richmond, where the judgment of the Police Court was affirmed (Record, 51), and the defendant found guilty of a violation of said ordinance. From this judgment a writ of error was allowed to the Supreme Court of Appeals of Virginia, where the same was docketed, but before argued, on November 18, 1914, *upon the motion of the company*, it was ordered that said writ of error *be dismissed* (Record, 48), and thereupon the counsel for the company, Hon. Charles V. Meredith, paid the costs (Record, p. 16), in connection with which fact the answer of the City of Richmond makes the following charge: "Thus leaving, as respondent is advised, believes and charges, the judgment of the Hustings Court of the City of Richmond in full force and effect and conclusive of every question now raised and sought to be litigated again in these proceedings" (Record, p. 16).

As stipulated in Clause 9 of Agreed Facts (Record, 112) after the ending of the litigation in the Supreme Court of Appeals of Virginia as stated above the said Company promptly paid without objection or protest the license taxes and other dues to the City for the years 1913 and 1914, assessed under the ordinance of the City the validity of which is now called in question in this case, but for the year 1915 refused to pay the license and rentals due for that year, and on June 15, 1915, it again resorted to legal proceedings by filing its bill in the District Court of the United States for the Eastern District of Virginia (Record, p. 2), seeking to enjoin the proceedings which were about to be taken by the City of Richmond to impose a fine upon the company for its failure to pay said license tax of \$300 and the rental charge of \$2 per pole on each and every pole owned, used or main-

tained by it upon the streets of the City of Richmond (Record, p. 8).

It thus appears that from the year 1900 or thereabouts to the date of the institution of this suit the complainant company complied with the requirements of the said ordinance and paid into the treasury of the City of Richmond the license tax and rental fees prescribed by the ordinance which is now complained of.

Concerning such a situation as applicable to the Western Union Telegraph Company, on whom a license fee of \$500 was imposed instead of \$300 as against the Postal Company, the ordinance of the City authorized the classification of telegraph companies in the matter of the imposition of license taxes for intrastate business (similar classification for the purpose of a license tax having been held by this court in the case of *Bradley v. Richmond*, 227 U. S. 477, 482-4, to be constitutional and valid, affirming a decision of the Supreme Court of Appeals of Virginia, 110 Va. 521), Goff, J., in the *Western Union Telegraph Company v. City of Richmond*, 178 Fed. 310, said at page 324, in holding the charge of \$2 per pole per annum not to be an unreasonable charge in a city of the size of Richmond:

"It may not be improper in this connection to notice, that I find from the record, that complainant, uncomplainingly paid this charge for over twenty years preceding the institution of this suit, and it seems to me that such acquiescence should, unless other reasons than those assigned exist, estop it from complaining now, so far at least as such charge is concerned."

which holding was recognized as sound in every particular by Mr. Justice Holmes in affirming the decree of the learned Judge below, 224 U. S. 160.

Hence it is submitted that for this reason the appeal should be dismissed or the decree below affirmed.

THIRD: That the contention of the complainant that the provisions of the ordinance of the City of Richmond in the bill mentioned are invalid by reason of excessive fines and penalties prescribed therein for their violation cannot be sustained in view of the fact that the identical ordinance complained of has been held not to offend against the doctrine invoked.

The fines and penalties prescribed in the ordinances in force at the time of the bringing of this suit are the same that were in force at the time of the decision in the case of the *Western Union Telegraph Co. v. Richmond*, *supra*.

In this case the same charge was made and vigorously insisted upon. Concerning it Mr. Justice Holmes, delivering the opinion of the court, at page 172, uses the following language:

"There is the frequently concurring contention that the ordinance is void because of the great penalties that may be incurred in the time necessary to test its legality. Especially mentioned is Section 27, as amended in 1902, which imposes a fine of from \$100 to \$500 for each pole remaining after the time set for their removal, and of from \$100 to \$500 for every week thereafter. It does not look as if the penalties in this ordinance were established with a view to prevent the appellant from resorting to the Federal Courts, nor do we apprehend that an attempt will be made to enforce them in respect to the past. But the penalties are separate from the rest of the ordinance, and if an oppressive application of them should be attempted, it will be time enough then for the appellant to file its bill."

This contention was likewise held by Goff, J., not to be sound, the Supreme Court of the United States, affirming his opinion in the language above quoted.

Among many like holdings we beg to quote from the following:

The case of *C. & O. Ry Co. v. Conley*, 230 U. S. 513, 522, cites and quotes with approval what was said in *Ex Parte Young*, 209 U. S. 123:

"Under this ruling, it does not appear that the company is in a position to attack the validity of the act by reason of its penal provisions. It has had its opportunity in court, and if the act be otherwise valid, it may avoid penalties hereafter by complying with it. Further, as was said in *Western Union Tele. Co. v. Richmond*, 224 U. S. 160, 'If an oppressive application of them should be attempted, it will be time enough then for the appellant to file its bill.' "

In *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 311, it was said:

"In answer to the present objection, it is sufficient to say that there is no showing here of an attempt to preclude such resort to the courts, or to deny to the carrier the assertion of its rights, unless it can be found in the severity of the penalties attached to disobedience of the order. And if it were assumed that these would be open to objection as operating to deprive the carrier of a fair opportunity to contest the validity of the commission's action, still the penal provisions would be separable, and the force of the remaining portion of the statute would not be impaired." Citing numerous cases, among them *Western U. Tel. Co. v. Richmond*, *supra*.

See also the recent cases of *Rast v. Van Deman*, 240 U. S. 320, and *St. Louis, etc., v. Arkansas*, 240 U. S. 518.

But even if the contention of the complainant on this point had any sound reason on which to rest, it was obviated and removed by an amendment to the ordinance made by the Council of the City of Richmond and approved July 19, 1915, after the institution of this suit,

by which it is provided that in no case shall the aggregate amount of fines or penalties imposed under the ordinance exceed the aggregate amount of rental fees due the City of Richmond. (Record, 99-100.)

The attention of the court is called to the fact shown in the pleadings and proof, that while the license tax imposed on the complainant for doing intrastate business is \$300, the license tax assessed against the Western Union Telegraph Company for doing a like business is \$500, and if it be alleged that the last annexation of territory to the City of Richmond, which became effective November 5, 1914, has materially increased the rental charges against the complainant, it is answered that the increase of 124 poles between the years 1913 and 1916 is not so great in percentage as the increase of the territorial area, and is but little greater in percentage than the increase in population of the city during the same period. The report of the United States Census Bureau shows that the population of the City of Richmond for the year 1910 was 127,628, while the estimated population as compiled by the Census Bureau at the commencement of the year 1915 was 154,675.

It is, therefore, submitted that there is no merit in the contention made in the bill that the ordinance of the City of Richmond is invalid by reason of the imposition of excessive penalties, and this Honorable Court should not, for that reason, entertain the complainant's bill, but should grant the appellee's motion to dismiss or affirm.

FOURTH: The judgment of the Hustings Court of the City of Richmond (a court of record having jurisdiction of the issues involved in this case), pronounced on October 22, 1913, in proceedings between the appellant and the appellee in this case remained in full force and effect when these proceedings were instituted, and therefore this proceeding is a matter *res judicata* and bars the complainant from further litigation on said issues.

In Michie's Ency. U. S. Supreme Court Reports, Vol. 10, at page 732, discussing the doctrine of *res adjudicata*, it is said:

"Stated generally and without detail, the theory of the law is that matters which have once been fully investigated between the parties and finally determined by a court of competent jurisdiction shall not be again contested, and the general principle is well established, and announces in numerous cases that a right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, or defense, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains in force and unmodified, and is not subject to further inquiry as between such parties or privies in the same or any other court. The principle is equally available and potent whether it is set up by a defendant as an answer to a cause of action, or by a plaintiff to prevent the same defense being used in the second case that was decided against in the first. Nor will the fact that one has contributed by his evidence to the recovery of a verdict and judgment, prevent the use of such record in his favor." (Citing numerous cases in Notes 1 and 2, among them *Baker v. Cummings*, 181 U. S. 117.)

In the case of *Burrell v. Burgess, Collector*, 73 Va. (32 Grat.) 472, 477, it was said by Anderson, J., delivering the opinion of the court:

"The precise question involved in this case was decided by the Supreme Court of the United States since the institution of this suit, in *Pace v. Burgess, Collector*, 92 U. S. 372, which affirms the constitutionality of the act of Congress—holding that the collection of 25 cents on each package of tobacco for exportation, from the exporter, is not a tax on the exportation of the article. In that case Pace was re-

quired to pay for the stamps affixed to the packages of tobacco he exported the sum of \$5,090. The question raised in this case is a *res adjudicata*, and is no longer an open question, so far as that tribunal is invested with power to determine it."

In *Kessler v. Eldred*, 206 U. S. 285, it was held:

"If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it."

In the light of these familiar principles concerning the application of the doctrine of *res adjudicata* and other authorities too numerous to be mentioned, it appears that the telegraph company by its own voluntary act, as hereinbefore set forth, abandoned its appeal to the Supreme Court of Appeals of Virginia from the said judgment of the Hustings Court of the City of Richmond, thus leaving in full force and effect that judgment.

It goes without saying that instead of dismissing, as it did, its appeal in the Supreme Court of Appeals of Virginia, the complainant company might have there had a hearing, and if the decision had been adverse might have appealed, as a matter of right (a constitutional question being involved), to this Honorable Court. But it did not do so, and, as a consequence, the judgment of the Hustings Court of the City of Richmond was final and conclusive in the matters there adjudicated, and on every other matter which might have been adjudicated on the pleadings.

If it be insisted that the exact issues in the case finally determined by the Hustings Court of the City of Richmond were not identical (found on pages 36-7 of the Record), it is to be answered that the authorities hold that the doctrine now invoked applies to every issue which the parties might have brought forward at the time. See *Beloit v. Morgan*, 7 Wall. 619; *Gould v. Evans-*

ville, etc., R. Co., 91 U. S. 526; *U. S. v. Dalcour*, 203 U. S. 408, 429.

In the case of *Postal Telegraph-Cable Company v. City of Charleston*, 153 U. S. 692, the Supreme Court held that a license tax of \$500 upon a telegraph company which had accepted the provisions of the Act of July 24, 1866, upon business done exclusively within the city and not including any business done to or from points without the State and not including any business done for the government of the United States, is an exercise of the police power, and is not an interference with interstate commerce.

In *Postal Telegraph-Cable Company v. City of Norfolk*, 101 Va. 125, it was insisted by *this complainant* that the ordinance of the City of Norfolk which imposed a license tax of \$250, and in addition one dollar per pole for each pole and one dollar on every hundred feet of conduits in the streets of the City of Norfolk owned or used by any person, firm or corporation was for the same reason alleged here and alleged in the Charleston case invalid and unconstitutional and in restraint of interstate commerce, but the court citing the Charleston case held the ordinance of the City of Norfolk to be valid and constitutional.

The complainant here, not satisfied with its contention being in effect overruled by the Supreme Court of the United States in the Charleston case (153 U. S. 692) and by the Supreme Court of Appeals of Virginia (101 Va. 125), brought again the same question to the fore in the year 1915, by refusing again to comply with an ordinance of the City of Norfolk imposing a license tax of \$500 for doing *intrastate* business, and although losing its contention in the Circuit Court of the City of Norfolk took the question again to the Supreme Court of Appeals of Virginia, where the court again repudiated the contention of the complainant. (*Postal Telegraph-Cable Co. v. Norfolk*, 118 Va. 455.)

In closing the opinion in the first Postal case (*Postal Telegraph-Cable Co. v. Norfolk*, 101 Va. 125), at page 134 the court uses the following language:

“That case seems to dispose of the one under consideration. When we consider the amount of business transacted by the Postal Company within the City of Norfolk, and within the State of Virginia, it may be conceded that the taxes imposed upon it in various forms are onerous and oppressive, but the law operates upon all alike, is not repugnant to the Constitution of the United States or of the State of Virginia, and there is no ground upon which we can hold it to be invalid. *If it be a grievance, it is one which cannot be redressed by an appeal to the courts, but to the sense of fairness and justice of the law-making power.*”

In the last mentioned case the complainant sought to strengthen the contention made in the First, that the imposition of a rental charge would be confiscatory and therefore illegal and unconstitutional, but its contention on this point, as well as the other contentions made, were again overruled, the court speaking through Kelly, J., saying:

“The company having assailed the constitutionality of the ordinance, was bound to maintain its case, not by arbitrary formulas and artificial rules, but by evidence upon which the court could base an intelligent and reasonable judgment.”

If possible the evidence to sustain the contention in the case under judgment, found on pages 102-110, consisting of an affidavit of R. J. Hall and Edward Reynolds, agreed to be read as if in the form of a duly taken and certified deposition, when read in connection with the evidence which was before the court in the former case between the complainant and the City of Richmond, found on pages 64-98 inclusive and the agreed facts also found in the evidence, is far less conclusive of the contention of the company, than evidence which was rejected as in-

sufficient in the two Norfolk cases, and therefore to no appreciable extent does it alter the situation so as to justify a reversal of the holdings of the court in the Norfolk cases.

It is therefore submitted that the matters complained of in the complainant's bill are *res judicata*, and for that reason the motion of the appellee should be granted.

All of which is respectfully submitted.

H. R. POLLARD,
City Attorney and Solicitor for
the City of Richmond.

Service of two printed copies of the foregoing
Motion and Brief is hereby acknowledged this 27th
day of March, 1918.

(signed) JOHN N. SEPRELL, JR.

Attorney and Solicitor for
Postal Telegraph-Cable Com-
pany.

APR 24 1918

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

October Term, 1917.

No. 169

POSTAL TELEGRAPH CABLE COMPANY, APPELLANT

versus

CITY OF RICHMOND, APPELLEE.

Appeal from the District Court of the United States for the
Eastern District of Virginia.

BRIEF ON BEHALF OF APPELLANT ON MOTION TO
DISMISS OR AFFIRM.

JOHN N. SEBRELL, JR.,
Solicitor for Appellant.



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Supreme Court of the United States

October Term, 1917.

No. 469.

POSTAL TELEGRAPH CABLE COMPANY, APPELLANT

versus

CITY OF RICHMOND, APPELLEE.

BRIEF OF COUNSEL FOR APPELLANT.

Before proceeding to consider specifically the four grounds upon which the Appellee, City, bases its motion to dismiss or affirm, it will be helpful, if not necessary, to a clear understanding of the matters involved, to state plainly the facts, and the contention of the Appellant Telegraph Company as to the law pertaining thereto. A consideration of these will show that the Appellee's bold statement "that it is manifest that the appeal was taken for delay only", is without either substance or shadow to support it. In fact, it is difficult to conceive any benefit which could accrue to the Appellant by delay.

The Appellant is a telegraph company, having an office in the City of Richmond, Virginia, at which place

it is engaged in transmitting and receiving messages, both interstate and intrastate. The City of Richmond, in addition to an ad valorem property tax, imposes upon the Appellant two separate and distinct taxes, both of which it is contended are violative of the constitutional rights of the Appellant, each of which is separate and distinct from the other, and must, therefore, be separately considered.

The first tax is a flat license tax for the privilege of doing business and, in order to distinguish it from the other, it will be herein simply called the "License Tax".

The second is a tax upon the poles owned or used by the Appellant within the corporate limits of said City, and will be alluded to herein as the "Pole Tax".

We will first consider the License Tax.

LICENSE TAX.

By ordinance, set out in full on page 10 of the record, the city undertakes to impose upon the Appellant a tax of three hundred dollars per annum "for the privilege of doing business within the City of Richmond, but not including any business done to or from points without the state, and not including any business done for the Government of the United States, its officers or agents".

The contention of the Appellant is that the tax imposed by this ordinance, while, *in terms*, restricted to business done within the state, is in fact, a tax upon the Appellant's interstate business, and that this becomes so because the *intrastate* business at Richmond, is so small, that its net receipts therefrom are insufficient to pay the tax, and that the payment if compelled, must come from the other business of the Company, namely, its interstate business, since the laws of Virginia require Appellant to accept such intrastate business. Pertinent to this, is the fact that the Appellant is chiefly engaged in interstate business, the local or intrastate business being done most

largely by the Western Union Telegraph Company, as follows from the fact that the Appellant has only eighteen commercial offices in the entire state, while the Western Union Telegraph Company has over five hundred. The proof that the net receipts of the Appellant from its intrastate business is insufficient to pay the tax, is found on page 102 of the record, where it is shown by R. J. Hall, Assistant Treasurer of the Appellant, from an accurate account of expense and receipts, that the former even exceeded the latter. A summary of his figures is as follows:

Intrastate Receipts,-----	\$4,615.39
Intrastate Expense,-----	\$4,116.64
Intrastate overhead expense,-----	1,069.38
Taxes—State,-----	419.61
Taxes—Richmond -----	8.03
Depreciation,-----	254.60
Deficit,-----	1,252.87
	<hr/>
	\$5,868.26 \$5,868.26

The correctness and sufficiency of this proof is nowhere questioned or challenged, nor can it be. It stands as an uncontradicted and uncontested fact in the record, alleged in the Appellant's bill, not denied in the defendant's answer, and fully proved in the evidence, that the net income at Richmond from the intrastate business of the Appellant is not sufficient to pay this tax.

The precise question here raised was presented to this Court in *Pullman Company v. Adams*, 189 U. S. 420. In that case, the State of Mississippi was undertaking to collect a license tax from the Pullman Company for business done by it *within* the State. The Pullman Company offered, as a defense, evidence which showed that the receipts from its *intrastate* business, after paying the ex-

penses chargeable against it, were not sufficient to pay the tax, and that, consequently, the tax was in fact a burden upon its interstate commerce since the Constitution of Mississippi made them common carriers and they were therefore compelled to accept local passengers. This court held that if they were so compelled to accept local passengers the invalidity of the tax would be assumed.

Mr. Justice Holmes said:

"The Company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the state was merely a burden on its commerce between the states, while at the same time, it argued, it was compelled to assume that burden by § 195 of the State Constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above-mentioned § 3387 unconstitutional are the errors assigned.

If the clause of the State Constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the State Constitution and the statute combined would impose a burden on commerce between the state analogous to that which was held bad in *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. Rep. 851."

It would seem plain and clear that if to do any business, interstate or otherwise, telegraph companies are re-

quired to do local business and shall be taxed for doing such local business, a sum more than they receive for such local business, such tax becomes a burden upon that commerce which is not local. And so, it follows, according to the principles thus declared by Mr. Justice Holmes in *Pullman Co. v. Adams* (supra), if the State of Virginia compels interstate companies doing business in Virginia, to do also an intrastate business, the tax is invalid. It remains only to inquire, therefore, whether the Appellant is required by the laws of the State of Virginia to do the intrastate business for the doing of which the City of Richmond imposes the tax. The affirmative answer to this inquiry is found in the statutes of Virginia, which plainly speak for themselves, and in the decisions of the court of last resort in that state whose judgments, as it will be seen, have so frequently penalized the telegraph companies for their failure so to do.

By act of the General Assembly of Virginia, to be found on pages 116-117 of the record, telegraph companies not incorporated by the State of Virginia or the laws thereof, are given the right to construct, maintain, and operate their lines along the railroads and to occupy and use the public parks, roads, streets and alleys, only on condition that they first obtain a license to do business in this State.

With relation to the right of telegraph companies to use the roads, streets, etc., the Act says:

"Provided, also, that any such company not incorporated by the State of Virginia or the laws thereof, shall as a condition precedent to the enjoyment of any right or privilege granted by this chapter, first obtain from the State Corporation Commission a license to do business in this state and pay the fees and taxes imposed by law for such license."

Being thus required, as a condition precedent to the use of the roads, streets, etc., to obtain a license to do business in this state, by sub-section 5, of the Act, to be found on page 118 of the record, the telegraph company thus doing business in Virginia is required to transmit all messages delivered to it, or to pay a heavy penalty for its refusal or failure so to do.

The sub-section is as follows:

"It shall be the duty of every telegraph company doing business in this state to receive and transmit dispatches from and for other telegraph or telephone companies or lines, and from and for any person, upon the payment of the usual charges therefor, if such payment is demanded; to transmit the same faithfully, impartially, with substantial accuracy, as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or offering to send such dispatch or to the person to whom it was addressed; provided, however, that not more than one recovery shall be had on one dispatch, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order".

The state law in sub-section 1 of Section 1294 h, therefore requires defendant and every telegraph company not

incorporated by the State of Virginia, and therefore companies doing an interstate business, as a condition precedent to the right to construct, maintain and operate their lines along the railroad and to occupy the public parks, roads, streets and alleys, to obtain a license "*to do business in this state*", while sub-section 5 requires telegraph companies "*doing business in this state*" to receive and transmit dispatches delivered to it. What is meant by the phrase in the statute, "Doing business in Virginia?" Does it apply to interstate business as well as intrastate? It is certain that as used in sub-section 1, it applies to interstate business because by express language it applies to companies, "not incorporated by the State of Virginia or the laws thereof". It would be rather a strange construction to hold that an interstate company which was required to and did obtain a license to do business in Virginia, was not a company "doing business of transmitting and receiving messages, for compensation, in this state", and subject, therefore, to the requirements of sub-section 5 of Section 1294 h, and sub-section 6 of same section. The test of liability under the Virginia statute is whether the company is "doing the business of transmitting and receiving messages, for compensation, in this State". The statute does not distinguish between the business of transmitting or receiving interstate messages and intrastate messages. It is satisfied by the doing of either or both. It has therefore been held by the Supreme Court of Appeals of Virginia to be applicable to both, as is instanced by the case of *Umstadter v. Postal Telegraph-Cable Company*, 103 Va. 742, where the message was interstate, and *Western Union Telegraph Company v. Reynolds*, 100 Va. 459, where the message was local, and numerous other cases. The Supreme Court of Appeals having held that the statute is applicable to companies doing either interstate or intra-

state business, such must be the construction given it by all courts. (Osborn v. Florida, 164 U. S. 650.)

The precise question was also decided favorably to the contention of the Appellant by the Supreme Court of Georgia in the case of Postal Telegraph-Cable Company v. Cordele, 141 Ga. 658, 82 S. E. Rep. 26, a case in all respects similar to the instant case, in fact identical with it except in figures, in which it was held by the Supreme Court of Georgia that where the net receipts of the telegraph company were not sufficient to pay the tax imposed by the City of Cordele upon its intrastate business the tax was unconstitutional and void. The Cordele case cannot be distinguished, either in principle or fact, from the case at bar.

The contention of the Appellant is also supported by the Supreme Court of Appeals of Virginia in the case of Postal Telegraph-Cable Company v. Norfolk, 118 Va. 455. While the decision in that case was, in the result, adverse to the telegraph company, it was because the proof in that case did not sufficiently show that the net receipts of the company at Norfolk were inadequate to meet the tax. In that case the telegraph company had contented itself by proving the amount of interstate and intrastate receipts and had *assumed* that the ratio between the two would be proper to be applied to division of the expense without any proof that such ratio was correct, and the court held that it could not, in the absence of such proof, hold that the receipts were insufficient. But the court did declare in plain and emphatic terms that if the proof should show that the tax exceeded the net receipts the contention of the telegraph company would be sound. Said Kelly, J.:

"The second proposition upon which the company relies for a reversal of the judgment is that the license

tax in question is an illegal burden on interstate commerce (the company doing a large interstate business), and is also confiscatory, and hence violative of the United States Constitution. The *soundness of this position depends*, in our view of the case, upon the correctness and sufficiency of the method used by the company in its effort to demonstrate, as a matter of calculation and book-keeping, that the tax is a burden on interstate commerce and confiscatory, as alleged."

It will be observed that the proof which was lacking in the case of *Postal Telegraph-Cable Company v. Norfolk*, *supra*, is fully supplied in this case by the uncontradicted testimony of R. J. Hall, Assistant Treasurer, and Edward Reynolds, Vice-President and General Manager, respectively, of the Postal Telegraph-Cable Company, to be found on pages 102 to 110 of the record.

The fact that the ordinance in question purports to limit the tax to intrastate business cannot avail the City of Richmond, if in fact it must be borne by the interstate or government business of the company. So long as the license tax is, *in truth and effect*, limited to domestic as distinguished from interstate commerce, it does not offend the constitutional provisions involved. This is the case of *Postal Telegraph-Cable Company v. Charleston*, 153 U. S. 692, cited by Appellee.

The principle of the law, which we insist must be applied here, is emphasized by an observance of the distinction between the cases of *Postal v. Charleston* (*supra*) and *Western Union Tel. Co. v. Kansas*, 216 U. S. 1. In both cases there was express legislative provision that that tax was imposed *only* on the *intrastate* business and a legislative disavowal of any purpose to burden interstate commerce. And yet the one was held to be valid and the other void. The distinction is found in this: that in the

Charleston case, the license ordinance, not in language only, but in fact and effect was restricted to the business done in the state; while in the Kansas case, though the language of the license enactment restricted the tax to the business done within the state, yet *in fact and effect* it was a burden upon interstate commerce.

In the instant case, the evidence shows that the tax required by this ordinance, though purporting to be limited to the business done within the state, must in fact be borne by the interstate or government business of the company. By an overwhelming weight of authority such tax is unconstitutional.

The case of *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, is in point where the Court at great length affirms the proposition that a State cannot, no matter under what guise, impose burdens upon the freedom of interstate commerce. It said at page 26:

"We are aware of no decision by this Court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee', or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent' *in fact* on the value of its property situated within the State. *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 696; *Leloup v. Mobile*, 127 U. S. 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purpose of its interstate business, and

without obtaining a license from it for the purpose of its interstate business, and without liability to taxation there, *on account of such business.*"

And especially do we call attention to the language of the Supreme Court in the above case at p. 27, where it is said with respect to the claim of the State that it was not the intention of the State to embarrass or obstruct interstate commerce.

"But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burden interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to be substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show".

And again at pp. 37, 38:

"Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent. of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance. It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expense not only by exactions that directly burdened such commerce, but

by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general rights of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the supreme law of the land."

Chief Justice Fuller summed up the rule when he said in *Lugay v. Michigan*, 135 U. S. 161, at p. 166:

"We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." In the case of *Crutcher v. Kentucky*, 141 U. S. 47, the

Court said at p. 62:

"This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of State regulation, can be im-

posed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

We quote the language of the United States Supreme Court used in the case of *Norfolk, etc., R. R. v. Pennsylvania*, 136 U. S. 114, at p. 118:

"It is well settled by numerous decisions of this court, that a State cannot, under the guise of a license tax, include from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

In the case of *Leloup v. Port of Mobile*, 127 U. S. 641, where a license fee was imposed on telegraph companies without differentiation as between interstate and intrastate business, the Court at p. 648, said:

"In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress".

See also the following recent cases:

Kansas Ry. v. Kansas, 240 U. S. 227;
Galveston, etc. R. R. v. Texas, 210 U. S. 217;
U. S. Ex. Co. v. Minn., 223 U. S. 335;
St. Louis v. Arkansas, 235 U. S. 350.

POLE TAX INVALID.

By ordinance, set forth *in extenso* on page 10 of the record, all persons or corporations are required to pay to the City Treasurer a fee of two dollars for each telegraph pole used, possessed or maintained by them in any of the parks, streets, lanes or alleys of the City of Richmond, whether such person or corporation be the owner thereof or not.

It is the contention of the Appellant that the said ordinance in question and each of them are unreasonable, unjust and excessive, and are illegal and void because they, and each of them, are designed and intended to provide revenue from this form of taxation for the general expenses for the City of Richmond, and that no other object than this exists or has at any time existed for the exaction of the large sum of money imposed by the said ordinances and that the city does not own such interest in its streets as authorize the charge of a rental; that the City of Richmond is under no expense whatever in connection with issuing the license required to be taken out by said ordinances and each of them, and has not been at any time heretofore, nor was during the years 1914 and 1915 put to any expense or charge whatever in connection with inspecting and regulating the poles, wires or business of this complainant; that the said tax or license fee imposed by the said ordinances and each of them complained of above, is not based on the cost and expense to the city incident to any inspection and supervision and regulation of the complainant's lines and business within the said city, but that it is imposed notwithstanding that it is more than ten times the amount that could be possibly incidental to any such inspection, supervision, and regulation, together with all reasonable measures and precautions that

might possibly and could be required to be taken by the said City of Richmond for the safety of its citizens and the public; that the license tax or fee or charge imposed by the said ordinance is excessive and if every other town or city in the State of Virginia in which the complainant company maintains an office should pass similar ordinances the total amount exacted from the complainant would exceed ten thousand dollars per annum; and if the same kind of ordinances providing for excessive taxes for the towns and cities of all the other states of the United States in which the complainant company maintains offices were adopted, that company could not possibly pay the aggregate amount of such privilege taxes, but would immediately become insolvent by reason of the fact that the expense of operation, including such license fees or taxes, would be far in excess of the gross receipts of the complainant company from the whole country at large.

By decisions of this court it may be taken as settled that where the municipality owns the fee in its streets, or other right therein which authorizes a charge for the occupation thereof, license fees on poles placed therein, when reasonable, may be sustained as a rental.

St. Louis v. W. U. Tel. Co., 148 U. S. 92;
Postal Tel.-Cable Co. v. Baltimore, 156 U. S. 210.

But this court has held in a line of decisions that, where the municipality has no ownership in the streets which authorizes a rental, the only power for license fee exactions upon the instrumentalities of interstate commerce is derived from the police power.

Postal, etc. v. Taylor, 192 U. S. 64;
Postal, etc. v. New Hope, 192 U. S. 55;
Atlantic, etc. v. Philadelphia, 190 U. S. 160.

A correct determination of the character of the tax imposed by the ordinance under review, as to whether it may be regarded as a rental, or only as a tax under the police power, depends, therefore, upon the character of the rights of the City of Richmond in its streets. If it has such right in its streets as will authorize it to charge a rental for the occupation thereof by the Telegraph Company, then it may be conceded that the charge, if found reasonable, should be sustained. But if it has no such right in its streets, it must likewise be admitted that any tax, imposed, in whole or in part, for revenue, or which is not limited to the expenses of legitimate inspection, is invalid.

The fee in said streets is not owned by the City of Richmond, but is in the abutting owners (Rec. p. 114). The City of Richmond has no property right of any kind in the streets, the easement of passage therein being in the state. The City, by statute, is given the "power to lay off streets, walks or alleys; alter, improve and light the same, and have them kept in good order". Code of Virginia, 1887, section 1038.

The authority under which the Appellant erected its poles, is found in the state law (Code 1887, section 1287), as follows:

"Sec. 1287. Every telegraph and every telephone company incorporated by this or any other state, or by the United States, may construct, maintain, and operate its line along any of the state or county roads or works and over the waters of the state, and along and parallel to any of the railroads of the state, provided the ordinary use of such roads, works, railroads, and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof".

The consent of the council of the City referred to in this section must necessarily apply only to reasonable regulations as to location and such matters, for the city could not withhold its consent so as to deny the Telegraph Company the use of the streets. *New England Tel. Co. v. Essex*, 239 U. S. 313.

The consent of the City Council was given by ordinance which appears in full in the record on page 20.

If there could otherwise be any question of the lack of authority in the city, it must be set at rest by the case of *Richmond v. Smith*, 101 Va. 161, in which the city had undertaken by ordinance to confer upon the Richmond Carnival Association the right to erect a certain structure upon the street. The Supreme Court of Appeals of Virginia, speaking through Harrison, J., said:

"The ordinance of the city authorizing the erection of the structure in question is relied on to defeat the claim of the plaintiff. The city had no power or authority, in the absence of a grant from the General Assembly, to confer upon the Carnival Association the right to erect this structure in the public streets. No such authority is found in its charter, or the general law. On the contrary, the charter only gives the city authority to remove structures, obstructions, and impediments from the streets, and to prevent them from being encumbered or obstructed. The power and authority of the city is contained in its charter, and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the State. Having no legislative authority to grant the use of the streets for such purpose, the ordinance was a nullity, and in no way affects the plaintiff's right to recover in this case".

It being seen, therefore, that the city being without property rights in the streets, can impose only such tax as

is authorized by its police power, and, therefore, this case falls under the influence of *Postal v. Taylor*, 192 U. S. 64, and not under *Western Union Tel. Co. v. St. Louis*, 148 U. S. 92.

It appears from the record that there is no special inspection or supervision of the poles except by the regularly employed officers of the city with little or no additional expense, and that the license fees exacted from the Appellant in the ordinance are greatly in excess of any amount necessary for police inspection or supervision. In fact, this does not seem to be seriously controverted in the case.

It may be admitted that the city is authorized to impose an inspection or police tax sufficient to defray the necessary expenses of inspection and all other acts necessary to protect the public health and safety. But further than the expenses it cannot go. This power is derived from the general police power and the license fee must be reasonable in amount and based upon the disbursements of the municipality in connection with the inspection and supervision of the telegraph poles.

The Federal Constitution contemplates and permits only such state inspection taxes as are reasonable in amount, single in purpose, and assessed under a law designed for the safety of the community, as distinguished from a tax, which, in whole or in part, levies tribute upon interstate commerce for the enrichment of the coffers of the taxing community itself.

Brown v. Maryland, 12 Wheat. 419, 460;
Robbins v. Taxing Dist., 120 U. S. 489;
Leisy v. Harding, 135 U. S. 100;
Postal v. Taylor, 192 U. S. 64;
W. U. Tel. Co. v. Kansas, 216 U. S. 1.

The Supreme Court of Pennsylvania in the case of *Borough, etc. v. American, etc.*, 86 Atl. Rep. 717 (1913) said:

"If anything can be considered settled under the decisions of our Pennsylvania courts, it is that municipalities under the guise of a police regulation cannot impose a revenue tax".

This is a well established rule recognized by the courts of all the States and by the Federal court. Dillon on Municipal Corporations (5th ed.), Vol. 11, 665, says:

"The implied authority to license which flows from authority to regulate, confers authority on the city council to require the licensee to pay a reasonable license fee, but it cannot under the guise of a license fee or by virtue of its power to regulate, impose a tax upon the occupation".

In the case of *Atlantic, etc. v. Philadelphia*, 190 U. S. 160, the court, at page 164, speaking of the power of a municipality to exact a license fee from a telegraph company, said:

"When it is authorized only in support of police supervision the expense of such supervision determines the amount of the charge, and if it were possible to prove in advance the exact cost, that would be the limit of the tax".

In the case of *Postal v. Taylor*, 192 U. S. 64, the court, speaking of a license fee purporting to be based upon inspection, but where the proof showed no inspection was had, said at page 720:

"When we come to an examination of the grounds upon which this kind of a tax is justifiable, and when we find that in this case each one of those grounds is

absent, how is it possible to uphold the validity of such an ordinance? To uphold it in such a case as this, is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet because it is said to be an inspection measure the court must take it as such and hold it valid, although resulting in a rate of taxation, which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that do not exist in fact".

In the case of *Kittanning v. American, etc.*, 86 Atl. Rep. 717 (Pa. 1913), the court, at page 717, said:

"When such a license fee is imposed, the kind, character and cost of inspection must necessarily be the guiding thought of those whose duty it is to deal with the question. If the municipal authorities desire such inspection or deem it necessary as a protection to the public they must take the initiative by providing for it, and fixing the amount of the annual license fee to pay for it".

And the court, at page 718, said further:

"If under the evidence the jury should find that the cost of inspection to the Borough, including all such items as are above indicated, was say, \$100.00 a year for which a charge of \$1,700 was made, and that a fair share of this cost to Appellant would be \$25 a year, for which it was charged \$500, the conclusion would seem to be irresistible that the charge was excessive and unreasonable".

Among the cases holding such license fees as the one under consideration unreasonable, are the following:

Philadelphia v. Western Union, 40 Fed. Rep. 615,

where the City of Philadelphia exacted a fee of \$16,000, and the cost of inspection did not exceed \$3,500, and the court held such fee to be a tax.

In *Sunset, etc. v. Medford*, 115 Fed. Rep. 202, where a license fee of \$100 was imposed, which was clearly in excess of disbursements by the city.

Again, in *Saginaw v. Swift, etc.*, 113 Mich., 660, where a license fee of fifty cents per pole was imposed, when the cost of inspection was but five cents per pole.

In the case of *Atlantic Postal v. Savannah*, 133 Ga. 66, the court held that a demurrer to the telegraph company's petition that the license fee was unreasonable should be overruled, and at page 71, said:

"Inasmuch as the corporate authorities of the city had seen fit to levy a separate tax upon the company's poles, which tax can only be justified upon the necessity of police supervision, and as no money is expended by the city regulating the commercial business of the company, we must assume that the tax imposed upon the telegraph company is for the sole purpose of revenue".

Dillon on Municipal Corporations (5th Ed.), p. 599, says:

"Whether an ordinance be reasonable and consistent with the law or not is in general a question for the court and not the jury, and evidence to the letter on this subject is usually but not always inadmissible".

What would be a reasonable fee in one case might be entirely unreasonable in another. Again quoting from Dillon, (*supra*):

"But in determining this question the court will have to regard all the circumstances of the particular

city or corporation, the objects sought to be obtained and the necessity which exists for the ordinance”.

In *Atlantic, etc. v. Philadelphia* (supra), the United States Supreme Court, at page 167, said:

“What is reasonable in one municipality may be oppressive and unreasonable in another”.

In *Foote v. Maryland*, 232 U. S. 494, a similar question was involved. Mr. Justice Lamar said:

“The Constitution prohibits a State from regulating interstate commerce, but at the same time authorizes the collection of the necessary expenses of its inspection laws, with the result that interstate commerce is to that extent lawfully burdened. * * * If the cost of inspection is intermingled with other expenses as to make it impossible to separate the two, interstate commerce might be burdened by fees collected both for inspection and revenue—for a lawful and for an unlawful purpose”.

And, further:

“If, therefore, it is shown that the fees are disproportionate to the service rendered, or that they include the costs of something beyond legitimate inspection to determine quality and condition, the tax must be declared void, because such costs, by necessary operation, obstruct the freedom of commerce among the states”.

ORDINANCE VIOLATES CONTRACTURAL RIGHTS.

The right to use the streets for the erection of poles was granted directly by the state by section 1287 of the Code, supplemented by the ordinance of the city of March 16, 1889, and the grants there made when accepted and

performed by the Appellant, constituted a contract which is protected by the Constitution against impairment.

Owensboro v. Cumberland Tel. Co., 230 U. S. 58;
Boise, etc. Water Co. v. Boise City, 230 U. S. 84;
Louisville v. Cumberland Tel. Co., 224 U. S. 663.

Under the terms of the franchise the telegraph company has expended large sums of money and established what the city knew was to be a permanent plant. It has complied fully with the provisions of the ordinance, and the city has enjoyed the rights and privileges reserved to it therein. The ordinance, subsequently adopted by which Appellant is required to pay a license fee of \$2.00 per pole impairs the rights of Appellant under that franchise and contravenes the Constitution of the United States.

A case directly in point is Boise Artesian Hot and Cold Water Company v. Boise City, 230 U. S. 84. By ordinance of Boise City the right had been granted to the Water Company to lay water pipes in the streets. After the laying of the pipes, the city passed an ordinance requiring the water company to pay a monthly license of \$300.00 for the use and occupancy of such streets. This court held that the right acquired under the ordinance giving it the right to lay its pipes in the street was a substantial property right which was impaired by the subsequent ordinance imposing the license fee.

It is true that the Richmond City ordinance granting the right to the telegraph company to erect its poles in the street reserved the power in the council "to put other and additional restrictions and regulations upon the erection or use of said poles and wires by said company, and to require at any time by ordinance or resolution, that the use or erection of said poles and wires shall cease".

This is no more than a reservation of the police control of the streets, and of the mode and manner of placing and maintaining the poles and wires, incident to the unabridgeable police power of the city.

Owensboro v. Cumberland Tel. Co., 230 U. S. 60, 72.

The grant in this case is direct from the State of Virginia, with the consent of the city. "When such consent was once given, the condition precedent had been performed, and the street franchise was thereafter held, not from the city, but from the state; which, however, did not confer upon the municipality any authority to withdraw that consent".

Grand Trunk W. R. Co. v. South Bend, 227 U. S. 541.

Having thus generally discussed the principles involved in this case, we will proceed very briefly to consider specifically the four grounds assigned by Appellee in its motion to dismiss or affirm. We desire to call attention especially to the fact that these "grounds" are made to apply only to that ordinance which relates to the tax on poles, and leaves practically unchallenged the contention of the Appellant as to burden upon interstate commerce by the flat license or privilege tax.

STARE DECISIS.

1. The first ground upon which Appellee would base its motion to dismiss or affirm is that the question involved here had already been decided in *Western Union Telegraph Company v. City of Richmond*, 224 U. S. 171, and that under the doctrine of *stare decisis* that decision should control.

An inspection will disclose that the question presented for decision in that case is not the question presented here. In that case the ordinance regulating the occupancy of the streets by the Telegraph Company and requiring that the location, size, shape, and subdivision of the conduits, the material and manner of construction, must be satisfactory to the city engineer, was thought by the Telegraph Company to be an unreasonable interference with its rights to use the streets under the Post Roads Act. That case presented that single question for decision and the point, and the only point, decided was that the Post Roads Act gave the Telegraph Company a *permissive* right, only, to use the streets, which right was not violated by reasonable regulations by the city, and that where the city had such right in the street as to authorize a rental charge, a charge of \$2.00 per pole would not be held unreasonable in the absence of proof to the contrary.

The question as to the authority of the city to charge a rental for the use and occupancy of its streets,—that is whether such act was *ultra vires*,—and the question of reasonableness of such a charge, were not presented to the court in that case. They are among the questions presented here.

While the license fee of \$2.00 per pole was sustained in that case, it was expressly upon two conditions, neither of which exist in this case. (1) It was assumed that the city had such right in its streets as to authorize the charge of a rental. Mr. Justice Holmes in delivering the opinion of the court said: "The right of the city to the streets are left a little vague, but the bill assumes that they are such as to authorize the charge of a reasonable rental, on the principle of *St. Louis v. Western U. Tel. Co.*", and further, "We assume, as we have said, that the city has some interest in the streets that is affected by the presence or

by the establishment of conduits or poles". (2) There was an absence in that case of any proof of the unreasonableness of the charge. The fact seems to be, from an inspection of the record in that case, that the Western Union Telegraph Company regarded the ordinance as an unreasonable interference with its rights under the Post Roads Act, and limited its contest to that single contention. This is certainly the theory of the opinion which says:

"But, as we have said, this bill is brought on the theory that any such legislation by the State would be bad under the Constitution and Act of Congress—not upon the suggestion that the City of Richmond is acting *ultra vires*. If the City could be authorized to do what it has done, we must assume that it is acting within its powers. Taking up the question *so limited*, we agree with the court below that after the Appellant, as is found, has paid the charges without complaint, for many years, it would require *something more than a protest* now to induce us to find it unreasonable".

As has already been pointed out, the City of Richmond, as shown in this case, has no such right in its streets as will authorize a rental charge and therefore does not come within the principles of either *St. Louis v. W. U. Tel. Co.* or of *W. U. Tel. Co. v. Richmond*. But it does come distinctly under the principle of *Postal Telegraph-Cable Company v. Taylor*, 192 U. S. 64, and, if the doctrine of *stare decisis*, so much approved by the learned City Attorney of Richmond, is to be applied, the decision in *Postal, etc. v. Taylor* (*supra*), so well established and so many times followed, should control, and the decree appealed from should be reversed.

ACQUIESCENCE.

2. Appellee contends "that the long acquiescence of the complainant in the payment of the charges complained of precluded it from further contesting the legality of the ordinance".

The only possible effect that an acquiescence, such as is here claimed, could have, would be its tendency to support the reasonableness of the charge and to make necessary clear proof of its unreasonableness. To have such effect it must appear that the payment of the charge was without complaint and under such circumstances as would indicate that the charge had not been hitherto regarded as unreasonable. Neither of these conditions exist in this case. The local litigation, pointed out in the brief of the City Attorney, negatives any idea that Appellant has been acquiescent in any extent tending to a concession of the reasonableness of the charge. It must be apparent that compliance with the ordinance has not been due to any feeling that it was reasonable, but because the amount involved did not justify expensive litigation. The burden of contest would have been greater, even, than the burden of the tax. And so the Appellant found it necessary to submit to the unreasonable exaction in the City of Richmond, until in the year preceding this suit, the city, by the annexation of sparsely populated suburban territory, extended its grasping taxing hands, and almost doubled the pole taxes it had exacted of the Appellant in previous years, making the tax intolerable. It appears from the record (p. 6) that the taxes demanded of the Appellant at the City of Richmond amount to \$1,351.61, while the entire gross receipts of Appellant from its intrastate business there are only \$4,615.39. *Over twenty-nine per cent of*

Appellant's gross receipts from its intrastate business is demanded for taxes!

These figures cannot be viewed without a conviction that the exaction is both oppressive and excessive, and that if the other cities in which the Telegraph Company is engaged in business, should adopt a similar ratio, the Telegraph Company would be made bankrupt and its rights destroyed.

Any system of taxation which is subject to such abuses and constant temptation to large increases as is this license fee system is vicious in itself and is productive of constant conflict, imposition and unfair exactions by one locality as compared to another. There is no reason why telegraph companies should not be taxed in the usual general way, the same as railroad companies. Certain it is that if these license fees throughout the country are to be sustained by the courts without regard to whether they are reasonable or not in connection with the business of the company there will be no limit to them with the telegraph companies reaching all important points, and there will be no limit to the aggregate amount of them except by incessant litigation. The license fee system of taxation, certainly as to telegraph companies, has in former years, been in vogue only in the southern states practically, but the tendency now is to adopt it in other states, and if the different municipalities are allowed to fix a license fee at most any figure they see fit, it is plain that the Appellant, which from the nature of its business has to reach every large city in the country, would simply be overwhelmed and put out of business. The unfairness of this mode of taxation is illustrated in the very fact pointed out by the Attorney for Appellee, namely, the submission to this unreasonable exaction for years. That mode of taxation is manifestly

unfair which makes it necessary for the Telegraph Company to submit to arbitrary, capricious and unreasonable exactions because the Telegraph Company cannot afford to carry on expensive litigation in every city where it is imposed.

An uncomplaining and willing acquiescence may tend to establish the reasonableness of a charge, but the enforced acquiescence here exacted demonstrates its viciousness and iniquity.

3. There is no contention on the part of the Appellant that the ordinances are invalid by reason of the excessive fines and penalties prescribed therein for their violation; and it is therefore unnecessary to further refer to Appellee's third ground. The allegations of the bill with reference to the gross excessiveness of such fines and penalties were made in aid of equity jurisdiction by injunction.

RES ADJUDICATA.

The fourth and last ground assigned by Appellee is a contention that the matters involved in this suit were adjudged in the Hustings Court of the City of Richmond and are *res adjudicata*.

The judgment of the Hustings Court relied on was pronounced on the 22d day of October, 1913, upon a warrant summoning the Telegraph Company to show cause why a fine should not be imposed upon it for failure to pay the license fee on poles assessed for the year 1913. (See record pp. 48, 51.) The matter adjudicated and determined in the Hustings Court in that case was the liability of the Postal Telegraph-Cable Company to a fine for its failure to pay a license fee on two poles used, but not owned by it, in the year 1913. The final judgment of the

Hustings Court was *res adjudicata* as to the liability of the Telegraph Company for the fine imposed for its default of that year. But it, in no sense, precluded the city from proceeding by similar warrant to enforce compliance in any succeeding year, nor, the defendant from making defense in any such subsequent proceeding. The collection of taxes for the year 1915 and the attempt to impose a fine for default of that year is entirely a separate and distinct cause of action. It has been expressly decided by this court that a suit for taxes for one year is no bar to a suit for taxes for another year. The two are for distinct and separate causes of action. *Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301; *Wright v. Central R. R.*, 216 U. S. 420. Other decisions to the same effect may be found in *Cook on Corporations* (7th Ed.), p. 4008, note 4, and 23 Cyc. 1290.

In any case, for a judgment in a similar case to operate as a bar to a subsequent suit, there must be, first, identity of issue. See cases collated 10 U. S. E., p. 736, including decisions of this court in great number from *Clarke v. Young*, 1 Cranch. 181, to *Northern Pacific R. Co. v. Slaughter*, 205 U. S. 122. Second, the identical matters upon the same facts must have been actually litigated and determined. *Cromwell v. County of Sack*, 94 U. S. 351; *DeSollar v. Hanscome*, 158 U. S. 216, 10 U. S. E., 765, and *ca: ci*. Third, the facts must not have changed or arisen in the interval which may alter the rights of the litigants. *Guilford v. W. U. Tel. Co.*, 59 Minn. 332, 23 Cyc. 1290.

Neither of the foregoing essentials occur in this case. The issues are not identical, nor even similar. That case did not involve the authority of the city to charge a fee as a rental. That case did not involve the reasonableness of a charge of \$2.00 per pole on hundreds of poles brought

into the city, since the decision in that case, by the annexation of sparsely populated areas of contiguous country community. That case did not involve the contention that the revenue and privilege taxes are in operation and effect burdens upon interstate commerce. These are the vital questions involved in this litigation.

Reference is made by the City Attorney of Richmond, in his brief, to the cases of *Postal Telegraph-Cable Co. v. Norfolk*, 101 Va. 125, and *Postal Telegraph-Cable Co. v. Norfolk*, 118 Va. 455. A mere inspection of the first case will suffice to show that the questions involved in it were entirely distinct from the questions here presented. That case was, in fact, a sequel to the case of *Postal Telegraph-Cable Co. v. Richmond*, 99 Va. 192, in which the Supreme Court of Appeals of Virginia held that the license tax of \$200.00 per annum and \$2.00 upon each telegraph pole imposed by an ordinance of the City of Richmond was invalid, as interfering with interstate commerce.

The second Norfolk case referred to (*Postal Telegraph-Cable Co. v. Norfolk*, 118 Va. 455), did involve one of the questions presented in this case, namely, the question of the validity of the license tax of \$300.00, it being claimed that the net receipts from intrastate business were insufficient to pay the tax, and the court held that the proof was insufficient to show that the net receipts were not sufficient. But the court held that the soundness of the position of the Telegraph Company depended upon the sufficiency of proof, thereby in effect holding, as we have pointed out before, that where the proof was sufficient to show that the net receipts of the company from intrastate business did not pay the tax imposed, the same would be unconstitutional as a burden upon its interstate commerce. As applied, therefore, to the instant case, in which the

proof is plenary, and the fact is not denied, it would seem to us that the Norfolk case not only supports the contention of the Telegraph Company, but should be decisive of this question in its favor.

Respectfully submitted,

JOHN N. SEBRELL, JR.,

Attorney and Solicitor for Appellant.

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Office Supreme Court, U. S.
FILED

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JAMES D. MAHER,
CLERK.

Supreme Court of the United States

October Term, 1917.

No.  169

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,

vs.

CITY OF RICHMOND,
APPELLEE.

Appeal from the District Court of the United States
for the Eastern District of Virginia.

REPLY BRIEF OF COUNSEL FOR APPELLANT.

Respectfully submitted,
JOHN N. SEBRELL, JR.,
Solicitor for Appellant.



Supreme Court of the United States

October Term, 1917.

No. 469.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,

vs.

CITY OF RICHMOND,
APPELLEE.

Appeal from the District Court of the United States
for the Eastern District of Virginia.

REPLY BRIEF OF COUNSEL FOR APPELLANT.

In view of the great volume of the brief filed by the City Attorney of Richmond in which the issues in the case and the contentions of the Appellant seem to be misconceived, it will not be harmful to consume a page in recalling the pertinent facts of the case and the exact questions this Honorable Court is called upon to decide.

STATEMENT OF FACTS.

The Appellant is a telegraph company, having an office in the City of Richmond, Virginia, at which it is engaged in the telegraph business, transmitting

and receiving telegraphic messages between Richmond and points within the State of Virginia, as well as between Richmond and points without the State, and also messages for the Government of the United States. Its principal business is occupied with interstate messages. The intrastate business of the company is exceedingly small, there being only about eighteen commercial offices of the company within the State. Most of the wires of the company in the business and thickly occupied portions of the city are under ground, but in the other parts of the city its wires are strung upon poles, which poles are located upon the streets and alleys of the city, a large proportion of which were located upon sparsely settled territory which until recently was outside of the corporate limits of the city, but which have now been included within the same by reason of annexation of that territory to the city.

The city, by two separate ordinances, imposes two different charges upon the telegraph company, the one for doing telegraphic business, which is in the words and figures following:

"Sec. 15 (a) Express, telegraph and telephone companies having a place of business in the city, for the privilege of doing business within the City of Richmond, but not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents, shall be divided into four classes, and shall pay a license tax for such privilege, if in first class five hundred dollars; second, four hundred dollars; third, three hundred dollars; fourth, two hundred dollars. But nothing in this section shall be construed to affect, impair, or repeal the rights of the city, under section ten of chapter eighty-eight of

Richmond City Code of 1899, or under any amendment thereof, requiring telegraph and telephone companies to pay to the City of Richmond annual compensation for the use of its streets, parks and alleys in the planting of posts therein and stringing wires thereon, or constructing conduits along or under the streets and alleys and running wires therein." (Chapter 15, Richmond City Code, 1910).

—and the second imposes a charge of \$2.00 per pole on each pole used, possessed and maintained by the telegraph company within the corporation limits of the city, the section imposing such charge being as follows:

"Sec. 10. As soon as may be after the first day of the fiscal year of 1900, and thereafter annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay to the City Treasurer a fee of two dollars for each and every telegraph, telephone and electric light, or other pole used, possessed, or maintained by them respectively, in any of the parks, streets, lanes or alleys of the City of Richmond, whether such persons or corporation be the owner of such pole or not, except trolley poles used exclusively for stringing thereon wires for use in the propulsion by electricity of street railway passenger cars. Upon the receipt of the above fee by the treasurer the city auditor shall deliver to the person or corporation paying the same a tin plate, with a plain conspicuous number thereon to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter in a book to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of the tin plates delivered to the person paying such

license fee. He shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specific number of poles, and has received the tin plates of the given number therefor. Such person or corporation then shall have one of such tin plates securely fastened in some conspicuous place upon each of the poles used, possessed or maintained by it or him, as may be designated by said superintendent." (Richmond City Code, 1910, Chap. 40, p. 358).

With reference to the first ordinance, the facts are that the net proceeds from the intrastate business of the company are not sufficient to pay the tax imposed upon the company for the privilege of doing the business. It appears that the total gross receipts of the company from its intrastate business during the year complained of was \$4,615.39, and that the actual expense of doing such business, exclusive of the license fee, \$5,860.23. The tax, therefore, which is required of the city thus to be paid must be paid out of the interstate business of the company, and yet the company cannot decline this business since under the State law if they are doing an interstate business they are required also to do an intrastate business.

As to the poles: it appears that the only cost of supervision and inspection of the poles of the company is made by the various departments of the city in the discharge of their ordinary duties, for instance, the police department and the fire department, and that "the City of Richmond employs no additional servants or agents or officers for the sole inspection of, or any other attention to the poles, wires, or conduits for the telegraph company located within said city."

(Statement of agreed facts. Rec. p. 115.) The city does not own the fee in its streets, the same being in the abutting owners, the public having only the easement of passage.

THE ERROR ASSIGNED.

The whole issue in the case is the constitutionality of the aforementioned ordinances, and the error of the court complained of is in holding that the ordinances were valid and not unconstitutional.

POINTS.

These ordinances are, as we claim, unconstitutional for separate and distinct reasons and necessarily have to be treated separately. In the brief filed by Appellant on Appellee's motion to dismiss or affirm, the ordinance imposing the license tax of \$300.00, which was then and is now referred to as the license tax, was first considered and then that relating to the poles which was designated as a pole tax to distinguish it from the other. The Appellee considers the questions in the inverse order, and we will herein discuss them in the order in which they are discussed by the Appellee.

1. *Charge of \$2.00 per pole.*

This charge, whether called a rental, a fee, or a tax, can be justified only upon one of two grounds, either, first, as a rental, or second, under the police power of the city. We submit that it cannot be sustained, under the facts of this case, by either.

(1) *As a rental.* This charge cannot be sustained as a rental because there is no proprietary right in the streets which would authorize the City of Richmond to charge a rental for their use and occupation.

In order to authorize the charge of a rental for the use of the streets, it would be necessary that the city should have such an ownership or proprietary right in the streets as would authorize it to make a charge for the same. We have already discussed this in our brief on the motion to dismiss or affirm. Counsel for the City of Richmond cites, in support of his contention, that the city has such proprietary right, the case of *Washington, etc., R. Co. v. Alexandria*, 98 Va. 344, 349. This case does not support Appellee's contention that a *rental charge* may be exacted for the use of the streets of Appellee. By specifically granted authority from the State the city has a power to lay off, construct, and grade streets and regulate the use thereof by the public, but this means a regulation of its use for public travel. In the case cited, the City of Alexandria had the right to direct the kind of rails and the manner of their location upon the streets because the public travel over the streets would have been affected thereby. But the City of Alexandria would have had no power to have charged a rental from the railroad company for the use of the streets. The right to any such compensation for the use of the fee would have been in the abutting owner. This was directly decided by the Supreme Court of Appeals of Virginia in the case of *Hodges v. Seaboard & Roanoke R. R. Co.*, 88 Va. 653. In that case the Seaboard & Roanoke R. R. had, with the consent of the Council of the City of Portsmouth, laid its tracks upon one of the streets of that city. Hodges, who was an abutting owner,

sought an injunction upon the ground that the city had no interest in the fee but that the same remained in him, and that the existence of the railroad tracks upon the land was an additional servitude for which he was entitled to compensation. Judge Lacy, in that case, spoke as follows:

"The highway is, generally speaking, nothing but an easement comprehending merely the right of all the individuals in a community to pass and repass with the incidental right of the public to repair. This easement does not comprehend any interest in the soil, nor give the public the legal possession of it. The right of freehold is not touched by establishing a highway, but continues in the original owner of the land in the same manner it was before the highway was established, subject to the easement. The public has the right to pass and repass, and to repair, and anything which obstructs the use of the way is a public nuisance. Subject to this easement, the exclusive ownership of the soil, the freehold and all the profits remain in him who owned the ground before the highway was laid out over it; and he may maintain trespass or waste or recover possession subject to the easement. The herbage belongs exclusively to the owner of the soil, and he may maintain trespass against one who puts his cattle in the highway to graze, or against one who places obstructions there, or who, instead of passing along it, remains standing there, as a strolling musician, refusing to depart. The fact that the street, dedicated to public use, is within an incorporated city, makes no difference as to the ownership of the soil. The title remains in the owner; and except where there has been a regular conveyance or legislative transfer, is never in the corporation."

In *Warwick v. Mayo*, 15 Grat. 545, the Supreme Court of Appeals of Virginia, speaking through President Allen, said:

"The easement comprehends no interest in the soil. The right of freehold is not touched by establishing a highway, but continues in the original owner of the land in the same manner it was before the highway was established, subject to the easement. The dedication or laying out of a street within a corporation does not affect the ownership of the soil, and however enlarged the easement may be when within the limits of a corporation, in order to the beneficial use of it, and to effect the purposes intended when the easement was created, subject to such use, whether enlarged or limited, the title remains in the owner."

(2) *Under the Police Power.* The charge cannot be sustained under the police regulation because such a charge must be limited to the actual expense of inspection, while the charge in this case is greatly disproportionate, to say the least, to the service rendered. We have cited, in our original brief, a great many cases fully sustaining this contention, and it is not necessary to repeat them. The fact is, as we understand it, that until the filing of the Appellee's brief, the contention of the City of Richmond was wholly that the charge was a rental and not a tax for police inspection. And such seems to be the prevailing contention now of the learned City Attorney in his brief, for we find on page 25 thereof the following declaration in bold type:

"The ordinance imposing a *rental fee* upon the poles and wires of the appellant for the use

of the property right in the streets and alleys of the City of Richmond is not unconstitutional as alleged in the bill of complaint."

It is only upon such a contention that the learned City Attorney could rely so confidently as he does upon *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92.

Yet notwithstanding such is the position and contention of the Appellee, the learned counsel undertakes to support same as an inspection fee under the police power, and finds fault with our statements that it appears from the record that there is no special inspection or supervision of the poles except by the regularly employed officers of the city with little or no additional expense, and that the license fees exacted from the Appellant in the ordinance are greatly in excess of any amount necessary for police inspection or supervision. We vouch the record in support of our contention. It appears therefrom that such inspection of the poles in question as is had by the city is made by its police department, its fire department, and the electrical department. As to the first two departments, it appears that such duties are performed by the officers of the departments in the regular discharge of their other duties, and that no additional expense can therefore fall upon the city by reason of such inspection. As to the electrical department, it appears from the record that the city maintains an electrical plant of its own, and that it operates the fire alarm and police telegraph department, and that the duties of the electrical department are occupied mostly with this. W. H. Thompson, City Electrician and Superintendent of the Department, testifies on

page 70 of the record as to the extent of the inspection as follows in answer to questions:

"Q. I mean when you send men out to inspect poles.

A. General inspection of poles, no sir; that is done by the Police Department once a year.

Q. And your men go around and inspect poles that have been reported?

A. Yes, sir.

Q. And that is the extent of your inspection?

A. With the exception that the men are on the alert and see them, and some of the people see them traveling about.

Q. There is no general inspection, and no annual inspection, but you depend upon what reports come from the Police Department and also what reports come from your men as they go around attending to any duty, and they keep their eyes open and report what defective poles they see?

A. Yes, sir; they have got to see it, they have got to do it; the City uses those poles with them."

And on page 115 of the record, in section 28 of the Statement of Agreed Facts, will be found the following:

"That the City of Richmond employs no additional servants, or agents, or officers for the sole inspection of or any other attention to the poles, wires or conduits of the Telegraph Company located within said City. That the poles and conduits are located at such places and in such manner as has been directed by the City, and are so located as to interfere as little as practicable with travel or traffic, or other reasonable use of the streets of said City."

But apart from all this, it appears that the expense of the entire electrical department of the city is \$16,709.80, of which \$7,184.50 is confined to the fire alarm and police telegraph, leaving the total expense of the electrical inspection of all the city's electrical interests of \$9,525.30, (Record p. 68), and yet, as will be seen in paragraph 15 of the Statement of Agreed Facts on page 113 of the record, the aggregate amount of fees for poles in the city charged the companies owning and using them, is \$24,514.00. And by Section 27 of the Statement of Agreed Facts on page 115 of the record, "the money derived from the said taxes on poles is not kept as a separate fund, but is paid into the treasury of the city, and becomes a part of the general fund of the city."

It appears, therefore, that there is no independent inspection of the Appellant's poles and that the only inspection which is made is one by the city employees in connection with their other duties, and that the cost of inspection of the Appellant's poles is intermingled with the other expenses of the city, and that it is impossible to separate the two, and that the fees demanded from the Appellant and the corporations similarly situated are greatly disproportionate to the entire expense of the electrical department of the city. Pertinent and directly applicable to such a situation is the language of Mr. Justice Lamar in delivering the opinion of this Honorable Court in the case of *Foote v. Maryland*, 232 U. S. 494, in which he said:

"The Constitution prohibits a State from regulating interstate commerce, but at the same time authorizes the collection of the necessary expenses of its inspection laws, with the result

that interstate commerce is to that extent lawfully burdened. * * * * *

If the cost of inspection is intermingled with other expenses as to make it impossible to separate the two, interstate commerce might be burdened by fees collected both for inspection and revenue—for a lawful and for an unlawful purpose."

And, further:

"If, therefore, it is shown that the fees are disproportionate to the service rendered, or that they include the costs of something beyond legitimate inspection to determine quality and condition, the tax must be declared void, because such costs, by necessary operation, obstruct the freedom of commerce among the states."

2. THE LICENSE TAX OF \$300.00 FOR THE PRIVILEGE OF DOING BUSINESS IS A BURDEN UPON INTERSTATE COMMERCE.

In our brief on the motion to dismiss or affirm, we have fully set forth our contentions and the authorities in support thereof. We do not purpose to repeat them here. We have undertaken to show as a fact that the intrastate business by the Appellant in the City of Richmond does not yield a sufficient net income from its business with which to pay this tax, and that, therefore, it must be paid from its interstate business so as to become a burden thereon. The learned City Attorney of Richmond finds fault with us that we have stated that "the correctness and sufficiency of this proof is nowhere questioned or challenged nor can it be. It stands as an uncontradicted and uncontested fact in the record, alleged in the Appellant's bill, not denied

in the defendant's answer, and fully proved in the evidence, that the net income at Richmond from the intrastate business of the Appellant is not sufficient to pay this tax." We again vouch the record. In the sixth clause of the bill of complainant found on page 5 of the record, is an allegation of the receipts and expenses of the Richmond intrastate business showing a deficit. The defendant's answer with reference thereto, as found on page 14 of the record, is: "Respondent knows nothing concerning charges made by other cities of the Commonwealth, nor concerning the revenues of the complainant from its business, and, therefore, neither admits nor denies said statements and calls for proof of same."

Full proof thereof is found in the testimony of Robert J. Hall, Assistant Treasurer, on page 102 of the record, which in substance shows the following receipts and expenses:

"Intrastate Receipts.....	\$4,615.39	
Intrastate Expense.....	\$4,115.64	
Intrastate overhead ex-		
pense.....	1,069.38	
Taxes—State.....	419.61	
Taxes—Richmond.....	8.03	
Depreciation.....	254.60	
Deficit.....		1,252.87
	<hr/>	<hr/>
	\$5,868.26	\$5,868.26"

--and also in the evidence of Edward Reynolds, Vice-President and General Manager of the Postal Telegraph-Cable Company, found on pages 103, 110, of the record. We challenge the production of anything in the record which contests, contradicts or questions the correctness of this proof. For the first time, the

learned counsel for the Appellee in his brief undertakes to question the sufficiency of the proof, and cites the cases of *Wood v. Vandalia R. Co.*, 231 U. S. 1, and *Simpson v. Shepherd*, 230 U. S. 352. A very slight examination of those two decisions, however, will show that they are not at all applicable to this case. The *Wood* case pertained to railroad traffic, and everybody knows that railroad traffic consists of an almost infinite number of different articles, all the way from jewels to pig iron and hay, while a telegraph company has but one thing to do, namely, transmit telegrams by an electric current, and there is no difference in such transmission, either as to weight, value, cost of transmission, labor of transmission, time consumed in transmission, or in any of the other elements which make such a great difference in the different rates charged for the transportation of different kinds of railroad traffic. In the *Wood* case the Court points this out and said:

"It is plain, however, that it does not follow from the mere fact that the total operating expenses of a railroad, or of a division of a railroad, bear a given relation to the entire receipts of that road or division, that the cost of transportation *in the case of a particular class of traffic* bears the same relation to the revenue derived from that class. The ratio, in the first case, is found by bringing together a great variety of operations involving various rates and different outlays for *different sorts of traffic*. It is predicated of the whole volume of business considered as such, and may be far from true of *some part of it* considered separately. It does not purport to be an expression of the relative cost of *any specified part*, but simply of that of the entire traffic to which it applies." (Italics ours.)

That was a railroad decision and pertained to railroad traffic where the cost of transportation of a small article worth \$100 may be only \$1, while the cost of transportation of iron ore worth \$100 may be \$90. If the entire operations of the railroad had been confined exclusively to "a particular class of traffic" could the reasoning of the court have had any application? Why was it, in the Wood case, that it did not follow that the fact that the total operating expenses for a railroad bears a given relation to the entire receipts of the road, that the cost of transportation bears the same relation. The court itself answers the question. It did not follow because in that case the ratio was found by bringing together a great variety of operations involving different outlays for different *sorts of traffic*. Could such a reason exist in the business of telegraphing, where the operations consist in doing only one thing, viz., the transmission of words by electric current, and where the transmission was substantially the same and there was no difference in weight, value, cost of transmission, labor, time, or any other element of operation; in short, when the ratio is not found by bringing together a great variety of operations involving different outlays for different sorts of traffic.

When the question is divested of the difficulties arising from the diversity of traffic and the different outlays for different sorts of traffic, the conclusion is inevitable that the ratio of intrastate and interstate receipts *does* "give expression to the relative cost of intrastate and interstate operations in that particular part of the traffic."

The reasoning of these cases supports, rather than condemns, our method of determining the intrastate

expenses when applied to a particular class of traffic, such as the transmission of telegraphic messages. In the case at bar, the total intrastate receipts are given, and there is no difference in the character of the services rendered, and the Wood decision has no application. Furthermore, the court in that case pointed out that no proof had been introduced of the value of the railroad property in the state, and no proof of its entire intrastate receipts. That decision has no bearing on the very complete testimony given by Mr. Hall in behalf of plaintiff in error.

As to the Minnesota Rate Cases in 230 U. S. 352, etc., they have still less to do with the case at bar. The leading one of the Minnesota Rate Cases, namely, *Simpson v. Shepard*, 230 U. S. 352, decided four things as follows:

(1) That Congress has power (not yet exercised), under the commerce clause of the constitution, to regulate intrastate as well as interstate railroad rates, so far as such intrastate rates affect interstate rates.

(2) That the courts have power, under the due process of law provision of the constitution, to declare void a state reduction of intrastate railroad rates which such reduction affects interstate rates so that a fair return on the investment is not left to the corporation after paying operating expenses, allowing for depreciation, etc.

(3) That in ascertaining what is a fair rate, namely, one which will net a fair return on the investment, the value of the right of way is its value equal to the fair average market value of similar land in the vicinity, plus improvements, less depreciation; and that the division of expenses between intrastate and inter-

state business must be shown, not theoretically, but by details based on actual shipments.

(4) That a state reduction of intrastate railroad rates may be confiscatory and void as to an unprosperous railroad and at the same time be legal as to a prosperous railroad.

If our reasoning given above is correct, and we believe it is, it follows that the Wood case and the Minnesota Rate Cases have no application, and leaves the methods and principles employed by plaintiff in error, in arriving at the correct and proper ratio between intrastate and interstate expense, unassailed by any judicial decision or expression.

The method of calculation while not without judicial opposition, is not without judicial sanction and support. In a very recent case, directly in point and similar in every detail, the Supreme Court of Georgia has not only approved and accepted as correct the method of calculation herein employed, but, upon it has declared a similar ordinance of the City of Cordele invalid as being in conflict with the Constitution of the United States.

Postal Tel-Cable Co. v. Cordele,———Ga.———;
82 S. E. Rep. 26.

The Cordele case, *supra*, was decided as late as May 14, 1914, and takes into consideration and distinguishes the case of Williams v. City of Talladega, 226 U. S. 404, cited by the defendants in error. The Cordele case is, in no point, distinguishable from the case at bar.

Interstate messages and intrastate messages are, of course, handled by the same telegraph operator

indiscriminately, with the same instrument, the same Morse-alphabet, the same wires, and, in fact, the same in every way. It would be impossible, under these circumstances, to separate each item of service when performed as being chargeable to either interstate or intrastate business. It would be impossible to have each coulomb of electricity used in the transmission of each message charged to that particular message, or to charge to each message its part of the wages of the operator handling the same. It would be just as impossible to charge to each message its proportionate part of any other item of expense connected with the telegraphic business. Nor is such accounting necessary to arrive at the proper expense chargeable to either part of the service. When the total expense is known and it is also definitely known what part of the work done was interstate and what part intrastate, the proportion of the expense chargeable to either service is not a guess or an estimate, but is a simple and certain matter of arithmetical proportion. In the case at bar, the evidence is certain as to the amount of the total expense, and it is equally as certain as to what part of the work was intrastate and what part interstate, as shown by the receipts. The percentage is not a presumption, but a mathematical fact.

The real fact is that the calculation of the percentage as made in the record in this case is favorable to the city; for since the same service help is required for an intrastate message for which a charge of 25 cents is made, as is required for an interstate message of longer distance for which a larger fee is demanded, it would appear that the just proportion of the expense of the intrastate expense is greater than its proportion of receipts. To illustrate: If we should

send 100 messages from Norfolk to Richmond, the receipts would be \$25.00, while the receipts from 100 messages from Richmond to New York would be \$40.00. It is apparent that the expense of the messages to Richmond would be as great as that of the messages to New York, and that the proportion of expense actually incurred in intrastate business would be 50%; while according to the method employed in the case now before the court, the proportion would be only .3846%. Since the interstate message is, as a rule, sent at a higher rate than the intrastate message, and never at a lower rate, it follows that the percentage of expense properly chargeable to intrastate business, is greater than the percentage of intrastate receipts to the total receipts. It will be remembered that by regulation in Virginia, the charge for messages in the State is limited to 25 cents for ten words with two cents for each additional word, which is the minimum charge for any message. Of course, we have not taken into consideration any difference in cost of long distance current or of longer distance construction and maintenance.

These observations show that the apportionment of intrastate expense, as made in the record, is not only conservative, but that the intrastate expense could not be less than that given in the evidence in the case.

In *Wood v. Vandalia R. Co.*, *supra*, referring to the ratio between expenses and earnings, Mr. Justice Hughes said:

"Before such a ratio could properly be used in setting forth the costs of a specified proportion of the traffic, it would be necessary to have evi-

dence either justifying the conclusion that the costs, in proportion to the revenue, was substantially the same for that part of the traffic as for the whole, or that there was a material difference satisfactorily showing its nature and extent."

We have met in this case the proof suggested by Mr. Justice Hughes in *Wood v. Vandalia R. Co.*, *supra*, and also the proof which the Supreme Court of Appeals of Virginia held was lacking in *Postal Telegraph-Cable Company v. Norfolk*, 118 Va. 455.

On page 103 of the record will be found the following statement in the undisputed testimony of R. J. Hall, Assistant Treasurer of the Postal Telegraph-Cable Company:

"And that the receipts and expenses, and the character of the business done is such that the ratio between intrastate and interstate receipts will fairly represent the proper ratio of expenses between interstate and intrastate business."

And in the testimony of Edward Reynolds found on pages 103, 110, inclusive, that witness explains in detail the character of the service to be performed in the transmission of both messages, the comparative cost incident to the transmission of interstate and intrastate messages, and explained that the most equitable method of determining the proper proportion of the expenses incurred in and properly chargeable to intrastate business and interstate business, is to divide the expense according to the ratio which exists between the interstate and intrastate receipts. The facts to which he testifies showing the correctness of such a division are not denied so far as we have been able

to ascertain. We, therefore, submit that we have proved without contradiction that the net income from the intrastate business at Richmond is not sufficient to pay the tax imposed, and that it is a burden, therefore, upon interstate commerce which the statutes of Virginia compel this interstate telegraph company to assume, and is clearly within the case of *Pullman v. Adams*, 189 U. S. 420.

In this connection the distinguished City Attorney of Richmond has greatly misconceived our contention, as urged in our brief on the motion to dismiss or affirm. We have attempted in that brief to show that the State of Virginia by its statutes has required telegraph companies doing an interstate business to do also an intrastate business, so that the company could not decline the intrastate business and thereby avoid the burden imposed by the tax thereon. The learned counsel for Appellee misconceives our contention and charges us with contesting the constitutionality of those statutes. It will be apparent upon reflection that no such contention has been made by us.

Respectfully submitted,

JOHN N. SEBRELL, JR.,

Solicitor for Appellant.



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In the Supreme Court of the United States

OCTOBER TERM, 1918

No. 169

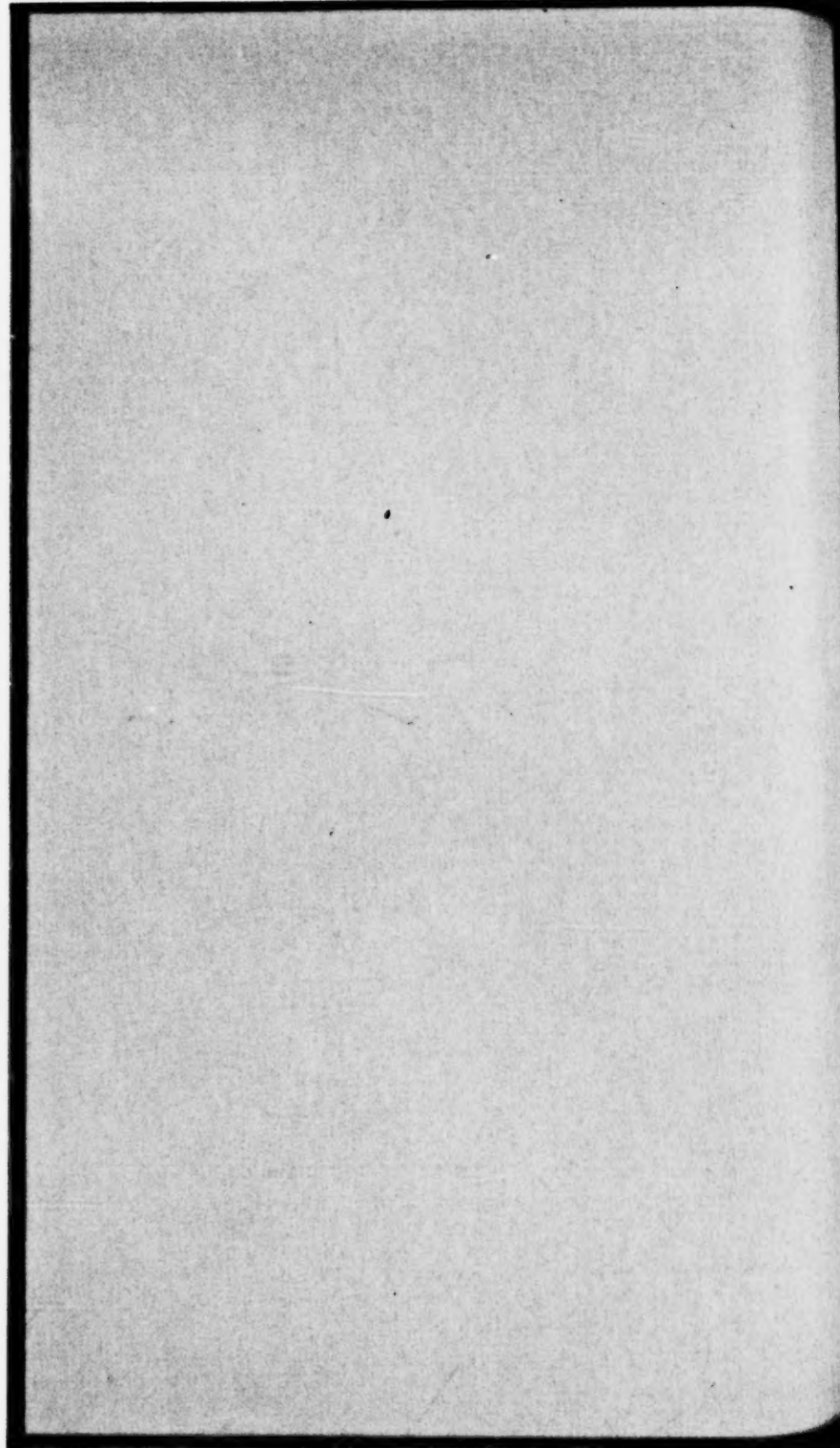
POSTAL TELEGRAPH-CABLE COMPANY, Appellant,

v.

CITY OF RICHMOND, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

H. R. POLLARD,
City Attorney and Solicitor for Appellee.



In the Supreme Court of the United States

OCTOBER TERM, 1918

No. 169

POSTAL TELEGRAPH-CABLE COMPANY, Appellant,

v.

CITY OF RICHMOND, Appellee.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.**

STATEMENT OF THE CASE.

This is a direct appeal from a decree of the United States District Court for the Eastern District of Virginia refusing the plaintiff—The Postal Telegraph-Cable Company—an injunction prayed for in its Bill in Equity to restrain the City of Richmond from enforcing the provisions of certain ordinances of the City of Richmond relating to the maintenance of all poles and electrical wires strung thereon, along and under the streets of the City of Richmond, and more especially from enforcing the provisions of two certain ordinances of the City of Richmond, one imposing an annual license tax on the complainant Company of three hundred dollars (\$300.), and the other an annual rental fee of two dollars (\$2.) for each and every telegraph pole “used, possessed or maintained” by the complainant in any of the parks, streets, lanes or alleys of the City of Richmond. These particular provisions are in the following language:

“Sec. 15 (a) Express, telegraph and telephone companies having a place of business in the city, for the privilege of doing business within the City of Richmond, but not including any business done to or from points without the State,

and not including any business done for the Government of the United States, its officers or agents, shall be divided into four classes, and shall pay a license tax for such privilege, if in first class five hundred dollars; second, four hundred dollars; third, three hundred dollars; fourth, two hundred dollars. But nothing in this section shall be construed to affect, impair, or repeal the rights of the city, under section ten of chapter eighty-eight of Richmond City Code of 1899, or under any amendment thereof, requiring telegraph and telephone companies to pay to the City of Richmond annual compensation for the use of its streets, parks and alleys in the planting of posts therein and stringing wires thereon, or constructing conduits along or under the streets and alleys and running wires therein." (Chapter 15, Richmond City Code, 1910).

"Sec. 10. As soon as may be after the first day of the fiscal year of 1900, and thereafter annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay to the City Treasurer a fee of two dollars for each and every telegraph, telephone, and electric light, or other pole used, possessed, or maintained by them respectively, in any of the parks, streets, lanes or alleys of the City of Richmond, whether such person or corporation be the owner of such pole or not, except trolley poles used exclusively for stringing thereon wires for use in the propulsion by electricity of street railway passenger cars. Upon the receipt of the above fee by the treasurer the city auditor shall deliver to the person or corporation paying the same a tin plate, with a plain conspicuous number thereon to be provided in the manner prescribed in the next succeeding section, for each and every pole upon which the said license fee is paid, and shall also enter in a book to be kept for that purpose, the name of the person or corporation to whom the license is issued, and the number of the tin plates delivered to the person paying such license fee. He shall also deliver to such person or corporation a certificate, under his own hand, that such person or corporation has paid the required license fee for that year on the specific number of poles, and has received the tin plates of the given number therefor. Such person or corporation then shall have one of such tin plates securely fastened in some conspicuous place upon each of the poles used, possessed or maintained by it or him, as may be designated by said superintendent." (Richmond City Code, 1910, Chap. 10, p. 358).

"Sec. 11. It shall be the duty of the city auditor, an-

nually, on or before the fifteenth day of January of each and every year, to purchase a sufficient number of tin plates, numbered with plain, conspicuous figures, beginning with number 1, and so on progressively, to be furnished, as prescribed in the preceding section of this ordinance, to the persons or corporations using, possessing or maintaining telegraph, telephone, electric light, or other poles, other than trolley poles used exclusively for stringing wires thereon for use in the propulsion by electricity of street passenger cars; the city auditor shall cause to be stamped with a proper die or planted on each of such tin plates the year in which they were issued; the said plates to be of suitable size and description, in the discretion of the City auditor." (Richmond City Code, 1910, Chap. 40, p. 359).

"Sec. 12. After the twentieth day of January, 1896, all telegraph, telephone, electric light and other poles in any of the streets, lanes and alleys of the City of Richmond (except trolley poles used exclusively for stringing thereon wires for use in the propulsion of street passenger cars), which shall not have been included in any list filed in accordance with the ninth section of this chapter, with the city engineer, or upon which the name of the owner is not legibly painted, printed, or stamped, or upon which the above mentioned license fee has not been paid, or on which the above prescribed tin plate is not securely fastened in some conspicuous place shall be forthwith removed by its owners." (Richmond City Code, 1910, Chap. 40, p. 359).

"Sec. 13. Any person, or persons, or corporation, using, possessing, or maintaining, any telegraph, telephone, electric light, or other poles, in any of the streets, lanes or alleys of the City of Richmond, who shall fail to file with the city engineer the list, as prescribed in section nine of this chapter or who shall fail to have stamped, printed or painted in legible characters his or its name as owner upon each of such poles, as prescribed in said section nine, by the twentieth day of January of each and every year; or who, if belonging to the classes required to pay a fee of two dollars on each pole by section ten, shall fail to pay the said fee, or shall fail to have the tin plate therein prescribed securely fastened in some conspicuous place by the said twentieth day of January of each and every year, upon all such telegraph, telephone, electric light, or other poles so used, possessed or maintained by him or them, shall be liable to a fine of not less than five nor more than one hundred dollars for each pole upon which he, they, or it are so in default; and each day of default to be a

separate offense. Such fines to be imposed by the police justice of Richmond." (Richmond City Code, 1910, Chap. 10, p. 359).

The gravamen of the bill is that the imposition of said license tax and said rental charge for the use of the streets is excessive and for that reason violative of the provisions of an Act of Congress, approved July 21, 1866, and the amendments and supplementals thereto, relating to the terms and conditions on which telegraph companies might use the postal roads of the United States for the planting of posts therein and stringing wires thereon and, therefore, confiscatory of the rights of the business conducted by the complainant.

To this bill the City of Richmond filed its answer, in which it was said that the right of the complainant to occupy the streets of the City of Richmond with its poles and wires was not an absolute right, but was "only a permissive right to maintain and operate its lines of telegraph over and along said streets and alleys within the City of Richmond under a special contract" with the City of Richmond, and that such contract grew out of the acceptance by the complainant of "the provisions of an ordinance of the Council of the City of Richmond, approved March 16th, 1889," an official copy of which was filed with said answer as Exhibit R, No. 1 (Record, p. 20), the same being passed by the Council of the City of Richmond in pursuance of the Act of the General Assembly, approved February 10th, 1880, and incorporated in the Code of Virginia, 1887, as Section 1287, and also in pursuance of Sections 19, 19g, and 19h of the Charter of the City of Richmond.

Section 1287 of the Code of Virginia is in the following language:

"Every telegraph and every telephone company incorporated by this or any other State, or by the United States, may construct, maintain and operate its line along any of the State or county roads or works and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads, and waters be not thereby obstructed; *and along or over the streets of any city or town, with the consent of the council thereof.*"

Sections 19, 19g and 19h of the Charter of the City of Richmond are in the following language:

"Sec. 19. The Council of the City of Richmond shall have power to enact suitable ordinances to secure and promote the general welfare of the inhabitants of the city, by them deemed proper for the safety, health, peace, good order and morals of the community, and to make and adopt ordinances and resolutions concerning the control and management of the fiscal and municipal affairs of the city, and of all property, real and personal, belonging thereto, deemed proper to secure the selection of honest and competent officers and to promote efficiency and integrity in the discharge of official duties, and may, in their discretion, create and maintain a special fund to be known as the "City Employees Fund," the profits of which shall, under rules and regulations to be established by them, be appropriated to aid in the maintenance of persons incapacitated for work by reason of age or infirmity, who, at the time of such incapacity, had been continuously in the employment of the city for at least twenty years, and may, in their discretion, provide for the establishment and maintenance of an employment bureau, by the aid of which unemployed persons may secure employment; and no injunction shall be awarded by any court or judge to stay the proceedings of the City of Richmond in the prosecution of its works, authorized to be done under this charter, unless it be manifest that it, its officers, agents or servants are transcending the authority given it by this charter, and also that the interposition of a court of equity is necessary to prevent injury that cannot be adequately compensated in damages.

They shall, in addition, likewise have power to make such ordinances, resolutions and regulations as they may deem desirable and suitable to carry out the following specified powers, which are hereby vested in them.

"19g. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in and conduits under said streets, or authorize the construction of conduits, and annex conditions and restrictions to the construction, maintenance and use thereof and they may prevent or remove any structure, obstruction or encroachment over or under or in any street or alley or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its works the streets of the city without the consent of the council. In the meantime, no order

shall be made, and no injunction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents or servants are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. And in any action against the city to recover damages against it, for any negligence in the construction or maintenance of its streets, alleys or parks, where any person is liable with the city for such negligence, every such person shall be joined as defendant with the city in any action brought to recover damages for such negligence, and where there is a judgment or verdict against the city, as well as the other defendant, it shall be ascertained by either the court or the jury, which of the defendants is primarily liable for the damages assessed.

"19b. To construct and maintain or authorize the construction or maintenance of bridges and viaducts over James River or other stream or creek, or over any ravine, where any portion thereof is within the city limits, and to construct and maintain, or authorize the construction and maintenance of, subways, vaults, areas, or cellars under the streets or other places, or elsewhere within the limits of the city, and charge and collect compensation for use of same, and to prevent injury to or obstruction of the streets, alleys, or other public places or property of the city; but any bridge constructed across James River under authority of this section shall be free to the public, except that compensation may be required of transmission or transportation companies for the use of such bridge."

Under the legislative authority just above quoted, the Postal Telegraph-Cable Company made application to the Council of the City of Richmond for permission to erect poles and run suitable wires thereon in the City of Richmond, subject to certain conditions, and in response to this application, thus made, the Council of the City of Richmond authorized the Company to erect poles and string wires thereon. That ordinance is in the following language:

"AN ORDINANCE

To Grant Permission to the Postal Telegraph-Cable Company to Erect Poles and Run Suitable Wires Thereon, in the City of Richmond, Subject to Certain Conditions.

Approved March 16, 1889.

"Be it ordained by the Council of the City of Richmond:

"1. That, subject to the conditions hereinafter stated, permission is hereby granted to the Postal Telegraph-Cable Company, for the purpose of telegraphic communication, to erect poles and run wires on the streets of said city, on such routes as may be from time to time determined upon and specified by a resolution or resolutions of the Committee on Streets.

"2. The quality, character, number, location, condition, appearance, and manner of erection of the poles, wires, and other apparatus needed for the use of said motive power shall be first determined upon and approved by the City Engineer. Whenever at any time the said poles, wires, or other apparatus shall, in the opinion of the City Engineer, need repairing, replacing, being made safe and secure, or being put into proper and suitable condition and appearance, the said company shall immediately proceed to do such repairing, replacing, making safe and secure, or putting into proper and suitable condition and appearance, as the City Engineer shall designate in writing, and all expenses arising therefrom, as to the poles, shall be borne *pro rata* by all persons or companies then using the same. For any violation of this section, the said company shall be liable to a fine of not less than ten nor more than one hundred dollars; each day's failure to be a separate offence.

"3. The permission or permissions herein granted shall be subject at all times to the power hereby reserved by the Council to put other and additional restrictions and regulations upon the erection or use of said poles and wires by said company, and to require at any time, by ordinance or resolution, that the use or erection of said poles and wires shall cease.

"4. Whenever any other restriction or regulation, as to the erection or use of said poles and wires, shall be required by the Council, the said company shall immediately proceed,

at its own expense, to conform fully thereto; and upon failure so to conform within the time specified by the Council, or, if the Council shall specify no time within which the regulation or restriction shall be done, then with diligence satisfactory to the Committee on Streets, after being notified of such requirement, the said company shall be liable to a fine of not less than ten nor more than one hundred dollars; each day's failure to be a separate offence.

"5. Whenever the said company shall be required by the Council to cease using said poles or wires upon any of the streets of the city, the said company shall cease so to use it within such time as may be designated by the City Council, and shall immediately proceed at the expiration of such time, to remove from the streets all said poles and wires, and shall restore the streets to the condition in which the remaining portions of said streets shall then be, and upon failure so to remove said obstructions and restore said streets after the expiration of one month after the time designated by the Council, all of said poles, wires and other apparatus required to be removed, the City Engineer shall, when ordered by the said committee, have the same taken up or removed and the materials thereof sold, and after paying all expenses arising therefrom, pay the balance, if any, to said company. For any violation of this section the said company shall be liable to a fine of not less than ten and not more than one hundred dollars; each day's violation to be a separate offence.

"6. By the acceptance of the permissions herein granted, the said company hereby agrees to indemnify and save harmless the city for all loss, costs or expense, to which it may be subjected, for any damage or destruction that may be done to or suffered by any one in his person or property, by reason of the erection or use of said poles or wires.

"7. The officials of the Richmond Fire Department and Fire Alarm and Police Telegraph Department are to have the power to cut any wire of said company whenever deemed necessary for the protection of the city's interests. The said city shall have the right to use, without compensation, any of the poles of said company whenever and in such manner as may be deemed desirable by said city for wires of said city.

"8. The Committee on Streets may require the said company to allow other persons or companies to place upon its poles and in such positions any telegraph, telephone, electric light wires or other wires used for the transmission of electricity, now belonging, or that may hereafter belong, to any

person or company, as the said committee may from time to time deem proper; and also to require said other persons or companies to afford such protection as the said committee may deem proper to such wires, when so placed, as will allow said wires to perform the purposes or functions for which they were intended. All such work as to placing of wires now in position is to be done at the cost and expense of said Postal Company. For any failure to perform any requirement ordered under this section, within ten days after being notified of such requirement by the City Engineer, the said company shall be liable to a fine of not less than ten nor more than one hundred dollars; each day's failure to be a separate offence.

"This ordinance shall be in force from its passage."
(Record, p. 20-21).

The said answer of the City of Richmond set forth that in pursuance of the authority thus given the Postal Telegraph-Cable Company entered upon the streets of the City of Richmond and planted its poles and strung its wires thereon, and concerning the illegality of the charge of \$300 "for the privilege of doing business within the City of Richmond, but not including any business done to or from points without the State, and *not including any business done for the government of the United States, its officers or agents*" and the charge of a rental (*not a tax*) of \$2.00 for each pole used, possessed or maintained by the company, that the ordinances imposing said charges were unreasonable, unjust and excessive and are therefore illegal and void, denied the truth of such charges and alleged that that question had been "*the subject of judicial investigation and determination in litigation between the complainant and the respondent,*" and that therefore "further inquiry concerning the same is precluded," and in connection therewith filed certain documentary evidence to sustain the contention of the City of Richmond, to which evidence the attention of the court will be specially called.

And in addition denied all of the allegations of the complainant's bill charging that the ordinances of the City of Richmond which imposed the license tax of \$300 upon the complainant for doing *intrastate* business in the City of Richmond and requiring the payment of a rental or fee of \$2.00 per pole for every pole used, possessed or maintained by the complainant and located on the streets of the City of Richmond were illegal and void as charged in its bill. In lieu of parol evidence being taken by the parties, by stipulation certain affidavits were filed and documentary evidence produced and made parts of the record, which will be found in the Record, pages 22-123.

The said answer also denied the allegation in the bill made that they were intended to derive a revenue for the general expenses of the City of Richmond, and, in the same connection, denied the statement that the defendant was under no expense whatever in connection with the supervision, inspection and control of the poles and wires of said Company, and also denied the allegation made concerning the cost and expense of the supervision, inspection and regulation of the complainant's business, etc.

And in connection with the said denials the defendant set forth that all of the grievances complained of in said bill had been the subject of judicial investigation and determination in litigation theretofore had between the complainant and the defendant and that, therefore, further inquiry concerning the same is precluded—the same being *res adjudicata* and, in order to sustain its defense, the defendant filed with its answer in this a complete copy of the proceedings had in the Supreme Court of Appeals of Virginia, a synopsis of which proceedings is set forth in stipulation of counsel found on page 128 of the record, from which it appears that on the 8th day of September, 1904, it presented to the Supreme Court of Appeals of Virginia, a petition with accompanying exhibits praying the said court to grant a writ of mandamus commanding the said complainant "to submit to the Committee on Streets and Shockoe Creek of the Council of the City of Richmond, plans and details showing the location, plan, size, construction and material of the conduits necessary in order to place its wires underground in the streets, alleys and public places of the City of Richmond within the territory mentioned in Section 27 of Chapter 88, Richmond City Code, 1899, as amended, and also requiring it fully and completely to comply with all of the provisions of Sections 26 and 28 of said Chapter 88"; to which petition for writ of mandamus the complainant here on December 31, 1904, filed its answer alleging at great length that all of the said sections of Chapter 88 of said Code, which are the same as the Richmond City Code, 1910, Chapter 49, which applied to the matters mentioned in the said petition and which required the complainant to submit plans and details showing the location, plan, size, construction and materials of its poles and conduits in the streets and alleys of the city were unreasonable and contrary to the Constitution and laws of the United States; and that sections 10 and 13 were also void, the respondent saying also that:

Section 10 of said ordinance provides among other things, that all persons and corporations shall annually pay to the Treasurer of the City of Richmond a fee of two dollars (\$2.00) for each and every telegraph pole used, possessed or maintained by them in any of the parks, streets, lanes or alleys of the City of Rich-

mond, and that this fee or tax is a gross violation of the rights and privileges of respondent under the aforesaid provisions of the Constitution of the United States and the amendments thereof and the aforesaid Acts of Congress, and is an unreasonable, unwarranted and illegal burden upon its foreign and interstate commerce and is repugnant to the aforesaid constitutional and statutory provisions. Furthermore that the said fee and tax of two dollars per pole per annum is enormously more than could be charged under any lawful form of taxation or for the expenses of supervision by said City of Richmond or by both combined. That said pole tax is very largely increased by the requirement of Section 10, that each user of the same pole is required to pay a separate tax of \$2.00 per annum on each pole so used.

Section 12 of said ordinance provided that any corporation using, possessing or maintaining any telegraph poles in any of the streets, lanes or alleys of the City of Richmond, who shall have failed by the 20th day of January of each and every year to pay a fee of two dollars (\$2.00) on each pole shall be liable to a fine of not less than five nor more than one hundred dollars for each pole upon which it is in default, and that each day of default shall be a separate offense, and that such fines may be imposed by the Police Justice of the City of Richmond. (Record, p. 128-129).

On the issues made before the Supreme Court of Appeals of Virginia in said mandamus proceedings full argument was had at the January term of said Court, 1906, and submitted for determination—but before said determination was made by the Court the following agreement was entered into by the City of Richmond and the Postal Telegraph-Cable Company, said agreement being in the following language:

"An agreement between the City of Richmond and the Postal Telegraph-Cable Company as to settling the controversy involved in the litigation between said parties now in the Supreme Court of Appeals of Virginia. The terms are as follows:

1st. That the proceedings are, upon the motion of the said City and with the consent of the said Company, to be dismissed.

2nd. That no penalties or fines are to be claimed or enforced against the said company because of any acts of the company complained of in said proceedings, or for any similar acts done or omitted to be done since the said proceedings were instituted.

3rd. After said proceedings shall be dismissed as agreed,

if the said City shall desire the said company to conform to the ordinance of the said City as amended since said proceedings were begun, due notice shall be given under said ordinance to file proper plans within two months after said notice, and to complete the work required within six months from such date.

4th. The order of dismissal shall allow to the said company all costs in the Court of Appeals, except for the taking before the notaries of the evidence offered by the said company."

Promptly thereafter, viz., March 21st, 1906, the defendant Company was notified by W. E. Cutshaw, City Engineer, of the said proceedings and required to submit plans and details showing the location, size, construction and materials of the conduits to be constructed by the said Company (Record, p. 34-111), and thereupon said Company submitted its plans as required and placed its wires in the underground section of the City of Richmond in conduits, as required by the ordinance of the City—which ordinances will be found in the Record, p. 22-23, inclusive.

It was further alleged in the answer of appellee that, not only from that time to January 1st, 1913, did the Company uncomplainingly comply with the provisions of the ordinances of the City of Richmond, relative to the placing of its wires in conduits in the underground territory, but also complied with the ordinances relative to the payment of the license tax and the annual fee of two dollars per pole on each pole owned, used, or maintained by it on the streets of the City of Richmond (Record, p. 111). But in the month of January, 1913, the said Company having refused to comply with the requirements of the said ordinances, was summoned to show cause before the Police Court of the City of Richmond why it should not be fined for failing to pay the rental of poles used but not owned by it, in which Court it was fined and, thereupon, the Company took an appeal to the Hustings Court of the City of Richmond, where the judgment of the Police Court was affirmed on the 13th day of October, 1913, (Record, p. 112), to which last named judgment the said Company applied to the Supreme Court of Appeals of Virginia for, and obtained a Writ of Error and Supersedeas to the said judgment but, for some reason best known to itself, the said Company moved the said Court that said Writ of Error and Supersedeas be dismissed (Record, p. 15-16), and a copy of the said order of dismissal having been filed in the Hustings Court of the City of Richmond on the 26th day of June, 1916, the following order was there entered:

"It appearing to the court from a writing filed this day that the said defendant has abandoned its appeal to the Supreme Court of Appeals of Virginia, it is ordered that the Clerk of this court, in lieu of issuing an execution against the said defendant for the fine and costs recovered against it by the City of Richmond, deliver a statement of said fine and costs to the said defendant, or to C. V. Meredith, Esq., its attorney, for payment."

and the fine and costs in question were subsequently paid by the Company, thus leaving, as the answer in this case alleges the judgment of the said Hustings Court in full force and effect and conclusive of every question now raised and sought to be litigated again in these proceedings.

The record shows that by stipulation expressly made a part of the record in the prosecution in the Hustings Court of the City of Richmond, on appeal from the judgment of the Police Justice of the City of Richmond finding the Company guilty of the offence charged in the summons issued by the said Justice, it was agreed that while the Postal Telegraph-Cable Company enters only the plea of "Not Guilty," yet that under this plea the said Company may and does defend upon the grounds that Section 10 of Chapter 40 of the Richmond City Code, 1910, is unlawful and void, and if not, then so much thereof is unlawful and void as imposes a fee of Two Dollars per pole upon poles "used," but not owned by the using Company, assigning the following grounds of error:

"1st. Because the said ordinance deprives the said Company of its property without due process of law, and is, therefore, in violation of Section 1 of Article 14 of the Constitution of the United States.

"2nd. Because it denies the said Company the equal protection of the laws in violation of Section 1 of Article 14 of the Constitution of the United States.

"3rd. Because it violates the rights and privileges secured to said Company by the Act of Congress, approved July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure the Government the use of the same for postal, military and other purposes and the acts of Congress amendatory thereof.

"4th. Because it interferes with and is a burden upon the occupation of said Company as an agency of the United States Government under the aforesaid Act and under an Act of Congress approved June 10, 1872, entitled, "An Act

making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1873, and for other purposes.

"5th. Because it imposes an unlawful burden upon and interferes with the interstate commerce in which said Company is engaged, and is in violation of Section 8 of Article 1 of the Constitution of the United States.

"6th. Because it is laid for revenue purposes, and not as a reasonable charge for inspection.

"7th. Because, if laid as a charge for inspection, it is unreasonable and excessive." (Record, p. 49-50).

And now having reference to the assignment of error to this Honorable Court (Record, p. 125-6), it will be seen that precisely the same questions which were solemnly adjudicated in the Hustings Court of the City of Richmond, a court of record, remaining unreversed, were called in question in the United States District Court for the Eastern District of Virginia and on an appeal from this decision, are again called in question in this Honorable Court.

The answer of the City of Richmond admitted that the City of Richmond did not own the fee in the streets and alleys in which were located the poles of the Company, but insisted that by virtue of the Act of the General Assembly contained in Section 1287 of the Code of Virginia, hereinbefore quoted, as frequently construed by the Courts of this Commonwealth, did own an easement in said streets and alleys—which ownership gave to the City of Richmond the right to charge a rental for the placing of poles and the stringing of wires thereon and that by reason of the grant of such easement by the Commonwealth, the City of Richmond was charged with the duty of keeping the streets and alleys in repair and free from obstructions, and made liable in damages to any person injured by reason of its failure to perform that duty (Record, p. 17); and in this connection denied the allegation in the bill made that such rental charge was discriminatory or denied to the complainant the equal protection of the law, and repelled the allegation made in the bill that it was a disguised effort to impose a tax against the entire business of the complainant Company done in the City of Richmond—including its interstate business—and denied the alleged charge that said tax was confiscatory and deprived the complainant of its property without due process of law, &c. In the same connection, said bill alleged that the only object which the City of Richmond had in making the imposition of said license tax and imposing the rental charge was to drive the defendant company from doing business in the State of Virginia, and in relation to this allegation attention was called

to the fact that a similar charge of sinister motive had been made in the proceedings instituted and prosecuted by the Western Union Telegraph Company against the City of Richmond—and to disprove any such motive the City of Richmond called attention to the amendments of the ordinances of the City imposing said license tax and rental charge by adding an amendment thereto in the language hereinbefore quoted, saying in effect that nothing in the said ordinances should be construed as depriving any telegraph company of its right to construct and maintain poles and wires for telegraphic purposes on the streets of the City of Richmond.

To sustain these defences the City of Richmond filed as exhibits with the said answer the proceedings in the Supreme Court of Appeals of Virginia in the said mandamus proceedings. (Statement of Agreed Facts "X"—Record, p. 110-113, inclusive).

On the pleadings thus presented and upon the evidence contained in the exhibits referred to in the bill of the complainant, and in the answer of the defendant and the documentary evidence hereinbefore referred to; the stipulation of agreed facts found on p. 53-63, inclusive, of the record; the statement of Theodore L. Cuyler, Jr.; the evidence of W. H. Thompson, Wm. H. Joynes, George Tomas Hutt, Louis Werner, Geo. E. Pollock, W. H. Thompson (recalled), Geo. S. Crenshaw, W. A. Barfoot, A. S. Wright, Geo. W. Epps, and a copy of Chapter 32, Richmond City Code, 1899—all of which is contained in Bill of Exceptions No. 2 to the ruling of the Hustings Court of the City of Richmond (Record, pp. 66-97, inclusive).—the Court, on January 9, 1917, refused the injunction prayed for and ordered the complainant's bill to be dismissed, filing its conclusions in the following language:

"CONCLUSIONS OF COURT.

Filed January 9th, 1917.

WADBILL, District Judge:

This cause is now before the court upon its merits, having been elaborately argued, orally and in writing, some time since, and submitted for final determination.

The conclusion reached by the court is that the complainant is not entitled to the injunction prayed for, or the relief sought, either as respects the license charge of \$300, annually assessed by the defendant against it for doing intra-state business in the City of Richmond, or the charge of \$2.00 per annum for each pole used, possessed and maintained by

it, in the parks, streets, lanes or alleys of the City of Richmond.

The City is clearly entitled to assess the license tax of \$300 against which relief is sought; and assuming \$2 per annum for each pole, as specified in Section 10 of Chapter 40 of the City Code of 1910, to be high, for the purposes for which the City may lawfully make such charge, still it cannot be said that the same is so unreasonable as to bring it within the inhibition of the Constitution, or warrant the court in substituting its judgment for that of the proper legislative body having the power to make the assessment.

It follows that the injunction should be denied, and the bill dismissed, and a decree to that effect will be entered on presentation." (Record, 123-4.)

And on January 26, 1917, the court entered the following order:

"This cause which was fully argued and submitted to the court on October 30 and 31, 1916, and the court not being then advised of its judgment to be rendered in the premises, took time to consider thereof, now came on this day to be further heard upon the bill of complaint, with Exhibits 'A' and 'B' therewith filed; upon the answer of the City of Richmond to the said bill, with Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 filed therewith; upon Exhibits 'Agreed Facts,' Nos. 1 and 2; Statement of Agreed Facts marked 'X,' and supplemental Statement of Agreed Facts marked 'Z.'

"On consideration whereof the court for reasons stated in writing and filed with the record January 9, 1917, doth hereby refuse to grant the injunction prayed for by the complainant in its bill, and doth adjudge, order and decree that the said bill be dismissed and that the said Postal Telegraph-Cable Company pay to the City of Richmond its costs about its defense in this behalf expended, to be taxed by the Clerk of this Court."

(Signed) EDMUND WADDILL, Jr.,
U. S. Dist. Judge." (Record, 124.)

A petition for appeal from said decree was filed March 5, 1917 (Record, p. 124) and filed therewith was an assignment of errors which is in the following language:

"The Postal Telegraph-Cable Company respectfully says that the decree made and entered in this cause on the 26th

day of January, 1917, refusing the injunction and dismissing the bill of the Postal Telegraph-Cable Company is erroneous, and hereby assigns as error in the making and entry of said decree the following, to-wit:

"First. That the Court erred in dismissing said bill, whereas the Court should have granted to the complainant therein the relief asked for by it.

"Second. That said decree is erroneous in that it adjudged Chapter fifteen (15) of Richmond City Code, 1910, to be valid and constitutional, and erred in failing to hold that the said section specified in the bill is unreasonable and repugnant to the Acts of Congress and the constitutional provisions enumerated and set forth in said bill.

"Third. That said decree is erroneous in that it holds that Section fifteen A (15-A) of Chapter fifteen (15) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Constitution and laws of the United States enumerated and set forth in said bill.

"Fourth. That said decree is erroneous in that it holds Chapter forty (40) of the Richmond City Code, 1910, to be valid and constitutional, and erred in failing to hold that each of the several sections specified in the bill is unreasonable and repugnant to the Act of Congress and the constitutional provisions enumerated and set forth in the bill.

"Fifth. That said decree is erroneous in that it holds that Section ten (10) of said Chapter forty (40) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

"Sixth. That said decree is erroneous in that it holds that Section eleven (11) of said Chapter forty (40) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

"Seventh. That said decree is erroneous in that it holds that Section twelve (12) of said Chapter forty (40) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

"Eighth. That the said decree is erroneous in that it holds that Section thirteen (13) of said Chapter forty (40) of Richmond City Code, 1910, is a reasonable requirement and not repugnant to the Act of Congress and constitutional provisions set forth in the bill.

"Ninth. That the decree is erroneous in that it did not

award to the plaintiff an injunction against the enforcement of the ordinances, and of the several provisions thereof, and each of them, heretofore enumerated as unreasonable and unjust."

The cause was thereafter duly docketed in this Honorable Court and on the 29th day of April, 1918, the appellee moved the court to dismiss or affirm the same for the reason that it was manifest that the appeal was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument, which motion the court took under consideration, but on the day of May, 1918, continued the consideration of the same until the hearing.

Leaving now the consideration of the said motion to dismiss without further argument than that submitted in the brief accompanying the same, we beg now to submit the following:

ARGUMENT.

In so doing, and in following the general line of argument, it is hoped that the repetition of much that is said on the argument of the motion to dismiss will not be wearisome to the court.

FIRST.

Did the City of Richmond have such proprietary rights in the streets of the City as to authorize it under the Charter and ordinances of the City to grant to the appellant the right to plant poles and run wires thereon along the streets or alleys of the City?

In the brief of counsel for appellant on the motion to dismiss or affirm this appeal, at pages 15-17, it is argued *that the City being without proprietary rights in the streets can impose only such tax as is authorized by its police power, and therefore this case falls under the influence of Postal v. Taylor, 192 U. S. 64, and not under St. Louis v. Western Union, 148 U. S. 92, citing Richmond v. Smith, 101 Va. 161.*

In answer to this statement, it is sufficient to say that nothing in that case (the Richmond case) negatives the right of the City to regulate or control for public convenience and use, the streets or other public places.

The basal fact in that case was that the City had allowed, by

express ordinance, *the use of the streets for a purpose not contemplated by the delegation of all or a part of its power to control the streets, resident in the State, which, on the contrary in the instant case the State had expressly delegated to the cities of the Commonwealth power to grant permission to telegraph companies to plant poles and string wires over and along the public streets of the cities of the Commonwealth.* (*Code of Virginia, 1887, Sec. 1287, above quoted*). If authority be needed to sustain the proposition that the State may delegate such power to a municipal corporation of its own creation the case of *Washington, etc. R. Co. v. Alexandria*, 98 Va. 344, 349, (where the Council of the City of Alexandria undertook to delegate to a steam railway the right to occupy a street), is sufficient. It was there said:

"Its charter and the general law confer upon the City of Alexandria ample power to control and regulate the laying out, repair and use of the streets. 'To do so,' said this court in *Roanoke Gas Company v. The City of Roanoke*, 88 Va. 810, 'is a power essentially incident to the existence and well being of every municipal corporation, and powers thus delegated are trusts held for the public good, are continuing and cannot be contracted away, nor can the municipality bind themselves by contract not to require them from time to time as the public good may require, * * * and of the necessity and expediency of the exercise of such power the City Council and not the court is the judge.' *R. F. & P. R. R. Co. v. City of Richmond*, 26 Gratt. (67 Va.) 83; *Davenport v. City of Richmond*, 81 Va. 636; *Charlottesville v. Southern Ry. Co.*, 97 Va. 428; *Roller v. Harrisonburg, Id.* 528.

"In *Burkhart v. City of Atlanta*, 30 S. E. 32, the court said: 'An incorporated city is a government within a government. It has its own executive, judicial and legislative branches. It is a creature of the State, and can exercise no power that is not derived from its creator.

"Where legislative power is conferred upon it by the State, it is necessary that a degree of freedom should be allowed in its exercise; otherwise, the city would be so hampered in the government of its people as would defeat the very ends of its incorporation.

"Hence it is that the courts will never interfere with the free exercise of such rights as are left to the discretion of a corporate authority unless such authority should go beyond the scope of power delegated, or unless the discretion given should be abused by an arbitrary exercise thereof, and by a plain and unwarranted violation of private rights."

It is significant that Judge Keith, President of the Supreme Court of Appeals of Virginia, delivering the opinion of the court in the case above quoted from, finds support to his holding by the following quotation:

"Mr. Justice Brewer, in *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, delivering the opinion of the court, said: 'The City is given power to open and establish streets, to improve them, and to regulate their use, etc. The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,694 it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the City, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be otherwise from a regulation of the use? And so it is only a matter of regulation of use when the City grants a telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the streets.

"To the same effect see *Gloucester Ferry Co. v. Penn.*, 111 U. S. 196-203. 'The power to regulate commerce' (says Mr. Justice Field, speaking for the court), 'is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted'."

Again the Supreme Court of Appeals of Virginia, in construing a statute *in pari materia*, incorporated in the Code of Virginia, 1887, as section 1093, which is in the following language:

"Sec. 1093. Streets, etc., of City or Town not to be occupied without their assent; damages to lots to be paid owners.— No company shall cross or occupy with its works the streets or alleys, public or private, of any city or town, without the assent of the corporate authorities thereof, unless such assent be dispensed with by special provision of law; and in case any lot or lots along the line of such streets or alleys, shall by such occupation or crossing, be impaired in value, such company shall, before crossing or occupying such streets or alleys, make compensation therefor to the owner of the same; said com-

pensation, if the parties cannot agree upon the same, to be ascertained in the mode prescribed by this chapter." (Code 1857, p. 311-312), uses the following language concerning the matter now under discussion:

"This section indicates an adherence to the general policy of the State to require municipal consent to the occupancy of its streets by a railway company. In accordance with this policy, it was held in *Wash. & Alex. & Mt. V. R. Co. v. City Council of Alexandria*, 98 Va. 344, that the power of a city to control and regulate its streets is an inherent and a continuing power, to be exercised as often as and whenever the City Council may think proper, subject only to the limitation that it must act in good faith, and that the regulation must be reasonable, and not imposed arbitrarily or capriciously, the presumption being in favor of the propriety and validity of what the city has directed to be done.

"In *R. F. & P. R. R. Co. v. City of Richmond*, 26 Gratt. 83, it is said, the right in a municipality to control the use of the streets, and to provide for the safety, comfort and general welfare of the citizens therein residing, is an inherent right. In that case, which was appealed to the Supreme Court of the United States (96 U. S. 521) the decision of this court was affirmed, which held that the ordinance of the City of Richmond forbidding the use of steam engines upon its streets by the R. F. & P. R. R. Co., though the railroad company had so used Broad Street for many years, and claimed the right to continue such use by virtue of its contract with the City, was a valid exercise of the authority in the city to control the use of its streets; the court being of opinion that the ordinance did not impair any vested right conferred upon the company by its charter, nor deprive the company of its property without due process of law." (*Newport News R. Co. v. Hampton, Etc. R. Co.*, 102 Va. 795, 802, *et seq.*)

See *Postal Tel.-Cable Co. v. N. & W. R. R. Co.*, 88 Va. 658, consulting Sec. 1287 of Code, and also *City of Danville v. Danville E. and F. Co.*, 114 Va. 382, 386, citing *Wash. & Southern Ry. Co. v. Alexandria*, 98 Va. 344; *N. & W. R. Co. v. Bristol*, 116 Va. 955, 962. In all three of the cases last above cited, the case of *Wash. & Alex. R. Co. v. Alexandria, supra*, is approved and followed.

No authority is needed to sustain the proposition that the construction placed upon a State statute by the highest court of the State, is binding upon this Honorable Court. Yet it may not be amiss to say, concerning the particular ordinance now under dis-

cussion, that the construction placed upon it by the Federal courts—including this Honorable Court—is the same as that made by the Supreme Court of Appeals of Virginia, as will be seen from the following quotations:

In the case of the *Western Union Telegraph Co. v. City of Richmond*, 178 Fed. 310, it is said:

"That complainant was not given permission by the Congress to occupy the streets of the City of Richmond without paying its fair proportion of the taxes required to maintain the government of that city, and without being required to submit to all reasonable regulations provided for by its council, has been so often announced by the courts as to justify the suggestion that questions relating to such matters might well be considered as disposed of. However, in deference to the earnest insistence of able and experienced counsel, I refer to a few of the decisions of the Supreme Court of the United States,

"In *St. Louis v. Western Union Telegraph Co.*, 128 U. S. 92, 100, 13 Sup. Ct. 485, 37 L. Ed. 380, that court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights."

"In *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, it is said:

"No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. * * * In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision."

"In *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162, the Supreme Court, speaking through Justice Harlan, said:

"The Circuit Court of Appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the act of 1866—a question to be presently considered—adjudged that the rights and privileges granted by that act were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the act of 1866."

In *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 540, 548, we find the following:

"While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

"While it is true that the city cannot impose a tax upon the franchises of the company, as that would be a burden upon interstate commerce, still it can make a reasonable charge for the use of its property, in which all the public are interested; and if the complainant occupies any of such property there is no reason why it should not pay a reasonable rent for it, as all citizens and all other corporations do for a like use. It is not a tax, in the sense in which that word is ordinarily used, but it is in the nature of a special toll, imposed for a specific use of designated property by a particular party. The poles deprive the city and the public of the use of certain portions of the streets, and frequently necessitate the excavation, repair, and inspection of the same, causing expense to the city and inconvenience to the public. A toll of two dollars per pole per annum might be an unreasonable charge along a country highway, but in a thickly settled section, like the streets of the City of Richmond, where many people for various purposes make continuous uses of them, the sum of two dollars per year

for such use per pole seems entirely proper and reasonable. It may not be improper in this connection to notice that I find from the record that complainant uncomplainingly paid this charge for over 20 years preceding the institution of this suit, and it seems to me that such acquiescence should, unless other reasons than those assigned exist, estop it from complaining now, so far, at least, as such charge is concerned."

Mr. Justice Holmes on appeal (224 U. S. 160, 169, 170, 171, 172) discussing this particular point raised in that case, said:

"The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U. S. 540, 544. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1." * * * "But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of commerce among the States, *gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the City or State where it owns the land.*" * * *

"The only ground of title disclosed by the appellant is the act of 1866, coupled perhaps with the fact that its lines are established. *The rights of the city to the streets are left a little vague, but the bill assumes that they are such as to authorize the charge of a reasonable rental on the principle of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92. Any license that the City may have granted as owner or representative of the owner of the public easement or otherwise may be assumed to have been revoked, and so far as the City's title is infringed by the appellant nothing appears to limit the City's right to insist upon it, as fully as a private owner might." * * *

"When the appellant without the right to exercise the power of eminent domain desires to occupy land belonging to others, *prima facie*, it must submit to their terms. We assume, as we have said, that the City has some interest in the streets that is affected by the presence or by the establishment

of conduits or poles." * * * "Even assuming, as seems to be implied by some of the language in *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 101, 105; *Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U. S. 539, that in consequence of the Act of Congress, the City is restricted to reasonable demands, the foregoing requirements do not seem to us unreasonable in view of the position of the parties."

If the cases of *Washington, &c., R. Co. v. Alexandria*, *supra*, and *Postal Telegraph-Cable Co. v. N. W. Ry. Co.*, *supra*, had been cited by the counsel as they should have been, it would have been unnecessary for Mr. Justice Holmes to have assumed as a fact that the City of Richmond had "such a property right in the streets of the City as would justify the granting of the right to telegraph companies to occupy its streets, which constituted a property right." (We feel justified in making this criticism of the counsel who represented the City of Richmond in that litigation, inasmuch as the same counsel now represents the City of Richmond in this litigation).

In answer to the contention made by the learned counsel for the appellant in his brief on the motion to dismiss, on page 17, where he argues that there was "lack of authority in the City" to grant his company the right to plant poles and string wires upon the streets of the City of Richmond, in view of the foregoing reasons and authorities, we confidently submit that the City of Richmond had such *proprietary* right in the streets as justified the Council of the City of Richmond, for adequate consideration, to grant to the appellant the right to occupy its streets.

SECOND.

The ordinance imposing a rental fee upon the poles and wires of the appellant for the use of the property right in the streets and alleys of the City of Richmond is not unconstitutional as alleged in the bill of complaint.

The principal case relied upon by the learned counsel for the appellant is the case of *Postal Company v. Taylor*, 192 U. S. 64. In this case it is said, at pages 69-70:

"The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any expenses arising

from inspection or supervision on its behalf. The fee itself is twenty times the amount of expense that might have been reasonably and fairly incurred to make the most careful, thorough, and efficient inspection and supervision that might have been made of such poles and wires, and for all reasonable measures and precautions that possibly could be required to be taken by the borough for the safety of its citizens and the public. This is not a mere expression of opinion. It is the averment of a fact. The company knows the amount it costs for the inspection, which it avers is made by its own servants, and which it avers is a most careful and efficient inspection one intended to place and maintain the poles and wires in a perfectly safe and satisfactory condition. Knowing that cost and comparing it with the amount demanded under the ordinance, it is enabled to state as a fact, and not as a mere opinion, that the amount of the license fee exacted under the ordinance is, as stated, twenty times more than it ought to be to secure a reasonable, efficient and most careful inspection, as set forth in the affidavit mentioned."

On the same day that the court decided the last above mentioned case, it decided and delivered an opinion in the *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, 59, another town of the State of Pennsylvania having a population a little in excess of a thousand (according to the last U. S. Census report), in which the same learned justice said:

"The ground upon which an ordinance of this nature may be upheld is stated in the two cases of *Western Union Tele. Co. v. New Hope*, 187 U. S. 119, and *Atlantic & P. Tele. Co. v. Philadelphia*, 190 U. S. 160."

Referring to the first named of these cases, it will be seen that the following language is used:

"The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. * * * Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts, not upon evidence consisting of the

opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same." Citing *Philadelphia v. Western Union Telegraph Co.*, 32 C. C. A. 246, S. C. 89 Fed. 454.

"Concurring in these views in general, we think it would be going much too far for us to decide that the test set up by the plaintiff in error must be necessarily implied, and the ordinance held void because of failure to meet it. *As the supreme court pointed out, the elements entering into the charge are various, and the court of common pleas, the superior court, and the supreme court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition.*

"This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, *but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on.*" Citing *St. Louis v. Western Union Tele. Co.*, 148 U. S. 92.

And referring to the second of the said cases, it will be seen that Mr. Justice Brewer, delivering the opinion of the court, lays down five propositions, which propositions he sustains by the citation of many cases familiar to the court. The last of the propositions is in the following language:

"Fifth: *No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor.*" Citing numerous cases. (190 U. S. 163).

And adding:

"The tax sought to be collected in this case was not a tax upon the property or franchises of the company, nor in the nature of rental for occupying certain portions of the street. Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision."

And on page 165, concerning the charge made in that case, says:

"*Prima facie* it was reasonable. *Western Union Tele. Co. v. New Hope*, 187 U. S. 419. *It devolved upon the company*

to show that it was not. The case, as we have seen, was tried before the court and a jury. Upon the testimony the court instructed the jury to find for the plaintiff the full amount claimed."

In 2 McQuillin on Municipal Corporations, at section 783 it is said:

"Clearly this is no privilege of license tax. The amount to be paid is not graduated by the amount of the business nor is a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the City—though it may be properly called rental." Adding a sentence from Mr. Justice Strong's opinion in *State Freight Tax Cases*, 15 Wallace 232, 278, "A tax is a demand of sovereignty; a toll is a demand of proprietorship." And further adding a quotation from Mr. Justice Brewer in *St. Louis v. Western Union*, 148 U. S. 92, 97, which is in the following language: "That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Suppose the City of St. Louis should find its City Hall too small for its purposes, or too far removed from the center of business, and should purchase or build another more satisfactory in this respect: it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms."

Concerning the case of *Postal v. New Hope*, 192 U. S. 55, much relied upon by the Counsel for the appellant, it is proper to call the attention of the court to the fact that precisely the same questions were involved in the case of *Western Union v. New Hope*, 187 U. S. 419, not cited or quoted from by the learned counsel in his brief, which expressly held that exactly the same tax as that under consideration in the *Postal* case was valid. The explanation, probably, of these diverging opinions grows out of the fact *that in each case the question of reasonableness of the ordinance was referred to a jury.* In the first case (*Western Union*) *the jury held the charges reasonable.* In the last case (*Postal*) *the jury held the charges unreasonable.*

And persisting in calling the impositions of the rental charge a tax in order to bring it under the influence of the doctrine in

regard to the levying of taxes which might be a burden on interstate commerce, the learned counsel in his brief on the motion to dismiss, says, at page 14 under the head of "POLE TAX INVALID":

"That the said ordinances in question and each of them are unreasonable, unjust and excessive, and are illegal and void because they, and each of them, are designed and intended to provide revenue from this form of taxation for the general expenses for the City of Richmond, and that no other object than this exists or has at any time existed for the exaction of the large sum of money imposed by the said ordinances and that the city does not own such interest in its streets as authorize the charge of a rental; that the City of Richmond is under no expense whatever in connection with issuing the license required to be taken out by said ordinances and each of them, and has not been at any time heretofore, *nor was during the years 1914 and 1915 put to any expense or charge whatever in connection with inspecting and regulating the poles, wires or business of this complainant; that the said tax or license fee imposed by the said ordinances and each of them complained of above, is not based on the cost and expense to the city incident to any inspection and supervision and regulation of the complainant's lines and business within the said city, but that it is imposed notwithstanding that it is more than ten times the amount that could be possibly incidental to any such inspection, supervision and regulation, together with all reasonable measures and precautions that might possibly and could be required to be taken by the said City of Richmond for the safety of its citizens and the public.*"

And again at page 18 makes the *ex cathedra* statement that:

"It appears from the record that there is no special inspection or supervision of the poles except by the regularly employed officers of the city with little or no additional expense, and that the license fees exacted from the appellant in the ordinance are greatly in excess of any amount necessary for police inspection or supervision. *In fact, this does not seem to be seriously controverted in the case.*"

It is submitted that in the face of the authorities hereinbefore cited on the point now under discussion that the learned counsel is utterly at fault. The record in this case shows that in two of the three cases which the complainant has taken to the courts,

raising practically the same questions now sought to be again raised by his client, was compelled when confronted with the City's defense, to withdraw from the contest and continue to acquiesce in the legality of the charge, and in response to the last sentence of the above quotation we beg to say that the record now before the court will show that in two of the three cases which the complainant has taken to the courts, raising this question the City of Richmond not only resisted the contention of the company, but its existence was so strong that in those two cases the company voluntarily retired from the contest and continued to pay the rental imposed until the institution of this suit, covering a period from the year 1900 to the institution of this suit on June 15, 1915, and in this suit, in answer to the charge made in the complainant's bill that the rental charge was "unreasonable, excessive and therefore illegal and void," the answer of the City of Richmond expressly denies said charge and all other charges either expressly or impliedly made in said bill concerning the imposition of the said rental charge (Record, p. 14), upon which issue so made the court below, on the hearing, held that "The City may lawfully make such charge," (Record, p. 123-4) and in its decree refused the injunction prayed for in the bill.

The courts of last resort, on the question at issue, have expressly held without dissent, that the basis for a charge of the sort now being discussed is founded on the fact that the right yielded to the telegraph company is a "*proprietary right*" and that in determining the value of this right, the following may be considered:

(1) Compensation for the absolute, permanent and exclusive appropriation of that part of the street which is occupied by telegraph poles, cross-arms, insulators and wires carried thereon. *St. Louis v. Western Union Tele. Co.*, 148 U. S. 92, 97, and *City of Memphis v. Postal Telegraph Cable Co.*, 91 C. C. A. 135, 137; *Western Union v. Mayor of New York*, 38 Fed. 552.

(2) Any increase in the force and apparatus of the fire department rendered necessary by the maintenance of poles and wires. *City of Philadelphia v. Western Union Tele. Co.*, 32 C. C. A. 246, 253; S. C. 89 Fed. 454.

(3) Expense to which the City may be put from time to time in connection with meetings of the Council for the purpose of regulating the erection of poles and wires. *City of Philadelphia v. Western Union Tele. Co.*, 32 C. C. A. 246, 253.

(4) The necessary or probable expense incident to the fixing of the location of the poles in the street. *Taylor v. Postal Telegraph Cable Co.*, 202 Pa. 583, affirmed in Supreme Court of United States in *Postal Telegraph Cable Co. v. Taylor*, 192 U. S. 61, 67, *Chester City v. Western Union Tele. Co.*, 154 Pa. 465.

(5) The necessary expense incident to maintaining a constant inspection of poles and wires for the purpose of seeing that they are safe. *Postal v. Taylor*, 192 U. S. 64, 69; *Western Union v. New Hope*, 187 U. S. 419, 426; *Western Union v. Mayor of New York*, 38 Fed. 552, (decided in 1888).

(6) The liability of the City for injury to individuals caused by defective poles and wires. *Chester City v. Western Union*, 154 Pa. 464, approved in *Western Union v. New Hope*, 187 U. S. 419, 425.

Coming now to the application of the evidence offered by the appellant to establish its contention that the rental charge of \$2 per pole made by the City of Richmond is unreasonable, we first beg to call the attention of the court to what was said by Mr. Justice Brewer in *A. & P. Tel. Co. v. Philadelphia*, 190 U. S. 160, 164, 165, and substantially stated in many other cases which need not be quoted:

"The tax sought to be collected in this case was not a tax upon the property or franchises of the company, nor in the nature of rental for occupying certain portions of the street. Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision, such as was presented in *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419.

* * * * *

"*Prima facie* it was reasonable. *Western Union Tele. Co. v. New Hope*, 187 U. S. 419, ante 240. It devolved upon the company to show that it was not. The case, as we have seen, was tried before the court and a jury. Upon the testimony the court instructed the jury to find for the plaintiff the full amount claimed."

The syllabus of the case, of *Wood v. Von Dalia*, 231 U. S., 1, as stated in 58 Lawyers Edition, p. 97, is in the following language:

"The ratio of the total operating expenses of a railroad or of a railroad division to the entire receipts of such railroad or division affords in itself no sufficient basis, when testing the reasonableness of rates prescribed under State authority, for determining the cost of transportation of intrastate freight traffic moving on class rates between two points of such division. Before such ratio can properly be used for this purpose there must be evidence justifying the conclusion that the cost of transportation in proportion to revenue is substantially the same for the particular traffic in question as for the total business of the road or division, or, if there is a material difference, satisfactorily showing its nature and extent."

In the case of *Knott v. Chicago, B. & Q. R. Co.*, 230 U. S., 474, in passing upon a similar question, the court used the following language:

"It is evident that in an apportionment of expenses either upon the revenue method, or upon the ton mile and passenger mile method, relations may be assumed which do not in fact exist. Thus, a division of expenses according to gross revenue assumes that the cost in relation to revenue is the same with respect both to intrastate and interstate traffic; in fact, it may be very different. A greater average sum may be charged for intrastate than for interstate hauls; and this greater sum may or may not be equal to the difference in cost."

In *Simpson v. Shepard*, 230 U. S., 352, the court used the following language:

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts."

And on page 465 the court said, in the same case:

"We are of opinion that, on an issue of this character, involving the constitutional validity of State action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting

data from which such extra cost as there may be, of intrastate business, may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared, at least during test periods, properly selected. It may be said that this would have been a very difficult matter, *but the company, having assailed the constitutionality of the State acts and orders, was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion.*"

From these cases it is seen that the Supreme Court of the United States is unwilling to declare invalid an act passed by a regularly constituted law-making body upon the assumption that a tax imposed may or may not be a burden upon interstate commerce, or a taking of property without due process of law; there must be some affirmative evidence introduced to show that the tax, as levied, is in fact burdensome and illegal.

In *Kansas City M. & B. R. Co. v. Stiles*, 242 U. S. 111, 118, Mr. Justice Day, delivering the unanimous opinions of this Honorable Court, says:

"It is urged that this tax is void because it undertakes to tax property beyond the jurisdiction of the State, and imposes a direct burden upon interstate commerce. Objections of this character were so recently discussed, and the previous cases in this court considered, in *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, that it would be superfluous to undertake extended discussion of the subject now. In that case, after a full review of the previous decisions in this court, it was held that each case must depend upon its own circumstances, and that while the State could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the State. As to the objection based upon the due process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the State is in part measured by the capital stock representing property owned in other States."

In passing upon the validity of an ordinance imposing a tax by the city of Philadelphia, the Supreme Court of the United States in *Atlantic &c., v. Philadelphia*, 190 U. S. 160, used the following language:

"We pass, therefore, to consider the question of the reasonableness of this license charge. *Prima facie*, it was reasonable. *Western Union Telegraph Company v. New Hope*, *supra*. It developed upon the company to show that it was not. The case, as we have seen, was tried before the court and a jury. Upon the testimony the court instructed the jury to find for the plaintiff the full amount claimed."

In the case of *Williams v. City of Talladega*, 226 U. S. 401, it was decided:

"A municipal license tax on the right of an interstate telegraph company to do local business within the State cannot be deemed to impose an unconstitutional burden upon its interstate business because a test for eleven months showed that the company did its intrastate business at the point at a net loss of 86 cents.

* * * * *

"The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of 86 cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right."

The conclusion seems to be inevitable that courts will not declare ordinances of cities invalid upon speculation or assumption, but will require definite and affirmative evidence to show that the ordinance is invalid and illegal.

As was said in *Shippson v. Shepard*, *supra*, "It is not a matter of formulas, but there must be a *reasonable judgment, having its basis in a proper consideration of all relevant facts*." (Italics ours.) This must of necessity be true; the tax cannot be set aside as invalid on presumptions or assumptions; how could it be so done, when the ordinances imposing the tax is, by courts, presumed to be valid. The courts require proof, not presumption, to overthrow an ordinance.

And along the same line Mr. Justice Holmes, deciding the case of *Western Union v. City of Richmond*, 221 U. S. 160, 172, says:

"The money charges of two dollars per pole and the same sum per mile of underground wire, are found fault with. Sec. 10, 32. Many of the cases relied upon by the appellant are cases turning on the limitations to the powers of the municipality. But, as we have said, this bill is brought on the theory that any such legislation by the State would be bad under the Constitution and act of Congress—not upon the suggestion that the City of Richmond is acting *ultra vires*. If the city could be authorized to do what it has done, we must assume that it is acting within its powers. Taking up the question so limited, we agree with the court below that after the appellant, as is found, has paid the charges without complaint for many years it would require something more than a mere protest now to induce us to find it unreasonable. The sum is not so great as has been charged and sustained heretofore. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 101, S. C. 119 U. S. 365. *Postal Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210. *Memphis v. Postal Telegraph-Cable Co.*, 164 Fed. Rep. 600, 91 C. C. A. 135."

This evidence, so far as material, consists of Exhibits A and B, with the bill of complaint (Record, p. 10); affidavits of Theo. L. Cuyler, Jr., Assistant Treasurer of the Postal Company, found at pages 61-65 of the Record; affidavit of R. J. Hall, Assistant Treasurer of said Company, found at page 102 of the Record; affidavits of Edward Reynolds, General Manager of the said Company, found at pages 103-110 of the Record, and certain stipulations as to agreed facts, tending, as it is claimed, to establish the contention made in the bill of complaint.

Concerning this evidence it is submitted most confidently that it does not overturn the presumption in favor of the reasonableness of the rental charge, while the appellee introduced evidence which is now proposed to be brought to the attention of the court which absolutely sustains the affirmative of the proposition that the charge is reasonable and valid.

The original ordinance imposing a rental tax of two dollars per pole was first enacted by an ordinance approved September 10, 1895, which was incorporated in Richmond City Code, 1899, as Chapter 88, Concerning wires, poles, conduits, etc., in, over and under the Streets of the City of Richmond (City Code, 1899, p. 427-432). The particular provisions of said ordinance imposing a rental charge, were contained in section 10 of said Chapter 88, and is in the following language:

"10. Annually, between the first day of January and the fifteenth day of January, all persons or corporations shall pay

to the City Treasurer, a fee of two dollars for each and every telegraph, telephone, electric light, or other pole, used, possessed or maintained by them in any of the parks, streets, lanes or alleys of the City of Richmond, except trolley poles used exclusively for stringing thereon wires for use in the propulsion by electricity of street passenger cars. * * *

This section was amended by an ordinance approved May 23, 1900, so as to make it plain that the rental charge not only on the person owning and using the poles, but also on any person or corporation using the pole, whether *owner* or not, and as so amended will be found as section 10 of the ordinances copied in full in the record from pages 22 to 33, inclusive, the particular section quoted above being at page 25 of the Record. This amendment was doubtless made, as indicated by Mr. Justice Holmes in *Western Union v. City of Richmond*, 224 U. S. 160, 170, 171, to prevent the multiplication of systems or poles in the streets of the City.

Although the City of Richmond, in the exercise of its police power, had the right to amend said section in the manner stated, yet if this right is questioned it can be justified by the express provisions of the ordinance of the City of Richmond, approved March 16, 1889, allowing the Postal Company to erect poles, etc., on the streets of the City of Richmond. This ordinance will be found at pages 20-21 of the Record.

By reference to section 1 of said ordinance it will be seen that the permission granted therein should be "subject to the conditions herein~~after~~^{above} stated," and by section 3 of said ordinance it is provided that the permission thereby granted shall be subject at all times to the power hereby reserved by the Council to put other and additional restrictions and regulations upon the erection and use of said poles and wires by said Company. (Record, p. 20).

In connection with other provisions of said ordinance it may be here mentioned as relevant that by section 6 the company agrees "to indemnify and save harmless the said City from all loss, costs or expenses to which it may be subjected for any damage or destruction that may be done to or suffered by any one, in his person or property, by reason of the erection or use of said poles or wires," and by section 7 it is provided that the officials of the Richmond Fire Department and Fire Alarm and Police Telegraph Department are to have the power to cut any wires of said Company whenever deemed necessary for the protection of the City's interests, and by section 8 the Committee on Streets may require the company to allow other persons or companies to place upon its poles and in such positions any telegraph, telephone, electric light wires or other wires used for the transmission of electricity and

to require other persons to afford such protection to such wires as the Committee may deem proper, when so placed, etc.

These latter references show clearly that a careful inspection and supervision over electrical wires strung along the streets of the City of Richmond was required to be constantly maintained by the Richmond Fire Department and the Fire Alarm and Police Telegraph Department (Record, p. 27, 69).

As to the duties of the Electrical Department, see Richmond City Code, 1910, Chapter 32, excerpts from which are found in the Record, from pages 95-96. It will there be seen that the Committee on Electricity was required to appoint, bi-ennially, two Electrical Inspectors, who, under the direction of the City Electrician, were required to inspect all electrical wiring inside of and outside of buildings, and that said inspectors were to receive a salary of \$1,080, per annum each, and that the City Electrician might, from time to time employ such other persons as might be necessary for the inspection and removal of all electrical appliances deemed unsafe and not in accordance with the rules and ordinances adopted by the Council, for which no owner could be found, but in case the owner could be found to require the removal by such owner. The said Inspectors were also required to inspect all overhead street construction poles, brackets, cross-arms, and all connections inside or outside, with buildings; test the candle power of any and all electric lights furnished by contract to the City, and such other electrical work as may be required of them by the Committee on Electricity. No repairs, changes or alterations were allowed to be made without a permit from the City Electrician. The said City Electrician was required to allot space zones on poles and to confine each company to the space allotted, the space to be measured from the tops of the poles downward, and the uppermost zone on every pole to be reserved at all times for the free use of City wires.

It is pertinent to say that in addition to the constant and unceasing inspection and observation provided for above the police department was required, once every year, to make a thorough and careful inspection of all electrical poles and appliances used in connection therewith and report defects therein (Record, pp. 26 and 82), and it was shown in evidence that the police force of the City of Richmond carefully and constantly observed this requirement. (Record, p. 78, *et sequa*).

We beg now to bring to the attention of the court the oral evidence going to show that the foregoing requirements were regularly, continuously and carefully carried out by the officers and agents of the City of Richmond.

The evidence of Wm. H. Thompson, City Electrician, intro-

duced by the appellee, will be found in the Record at pages 66 to 75, inclusive. He qualified himself as a proper witness in the case by stating that he was City Electrician and that he had held that position for about 25 years, and that he was also Superintendent of the Fire Alarm and Police Telegraph System. As to his experience he said he had grown up with the erection of telegraph poles in the City of Richmond; that he had served as President of the Association of Municipal Electricians, and had been an officer in said Association for ten or twelve years; that the membership of that Association was "Mostly electricians employed by cities, city officers. * * * Throughout the Country"; he stated his duties as City Electrician and also as Superintendent of Fire Alarm and Police Telegraph by saying: "Poles come under our inspection, and when complaint is made to the department by the police officers, or our inspectors, or citizens, I send a competent man to inspect the pole. In other words, it is the City Engineer's duty to erect the pole, and our duty to see whether it is properly put down, or not, from the time the pole is planted in the ground, supervise the erection and watch it and see what goes on it and all." Being asked concerning the annual cost of his department he fixed the aggregate of the items mentioned at \$7,184.50 (Record, p. 67), and states that under sections 14 and 15 of Chapter 10, Richmond City Code, 1910, the cost of the Fire Alarm and Police Telegraph System is \$9,525.30, annually, in addition to the foregoing cost, making the aggregate cost of the two departments \$16,709.80 (Record, p. 68), but further states, however, that there should be employed two additional inspectors at a salary of \$750 per annum, each to meet all the requirements of the City at the time he testified (October, 1913), saying also that such need was because of the recent growth of the City (Record, p. 69). He further testified that the Postal Telegraph Cable Company operates a large number of call wires in connection with their business; that call wires are lines of wires through commercial districts to enable patrons to call messenger boys to send messages back to the company's offices, saying that while most of them were in the underground district they had not been placed underground but were strung on house-tops and poles (iron and wooden poles owned by the various companies located in the streets of the City) and that it was important in the prevention of fires that all such wires should be inspected as well as other wires, and that his inspectors rendered that service. He stated that the inspectors were required to go on fire escapes and house tops and see that the wires were in proper shape, adding "because they must be high enough to be out of the way of a fireman's head on the roof," referring to times of conflagration when firemen have to resort to

the roofs of houses in the use of their apparatus to extinguish or prevent the spread of fires; that the occurrence of sleet storms necessitates a general inspection of all poles and wires to see that they are safe and not down; that this was done not only after sleet storms, but also after heavy wind storms. Concerning the danger from high-current wires he stated that the chief danger was caused by the telegraph wires coming in contact with the high-current wires. He was asked if there had been any loss of life by reason of telegraph wires overcharged with current by coming in contact with high-current wires, and stated that one of the firemen in the Fire Department of the City of Richmond had lost his life fire or six years previously by that means. He further stated on cross-examination that after severe wind storms or severe sleet storms his men were required to go about the City and not only look after the City's wires "but other people's wires and poles" as well. (Record, 69-74).

W. H. Joyner, a witness introduced on behalf of the appellant, testified that he was Chief of the Fire Department of the City of Richmond, and that he had been in the Fire Department 32 years, and Chief about four years; he testified that his department was not in the habit of making any general inspection, but that the inspectors or officers or any members of the Department who find any defective poles, are required to report them to the office of the Fire Alarm Department. He said, however, that members of his department inspected buildings, etc., and in passing through the town if they saw a pole that they thought dangerous it would be reported to the Fire Alarm Department, and stated further on cross-examination, that he had found defective poles and reported them; and further stated that he considered it important for the Fire Department that poles should be sound and safe and that he knew of no way by which they could be made safe "except by having them thoroughly inspected." (Record, p. 75-6).

Louis Werner, another witness, introduced on behalf of the appellant, stated that he was Chief of Police of the City of Richmond, and had been such for nine years. This witness stated that each year the Captains in the Police Department were required to make a thorough inspection of all the poles in the City, and to report thereon (Record, p. 78-79). He stated, also, that the Captains did not personally make the inspections, but that the inspections were made by the men under orders to the Captains (Record, p. 88); he produced a copy of an order, dated December 2, 1910 (Record, p. 86); that there were 163 men in his department, all told, of which 116 were privates; he quoted section 14 of Chapter 40, Richmond City Code, 1910, concerning his department, requir-

ing the inspection of poles by the Police Department, and stated that its provisions were strictly observed, under orders from the Chief of Police. (Record, p. 82). He was asked to produce the reports in writing made to him annually of poles found to be defective by inspection made by the men of his department, and stated that he would send down to the Clerk and get it.

Geo. E. Pollock, Secretary of the Police Department, was called as a witness on behalf of the appellee. He stated that he had held that position for eleven years; that the pay-roll of the department was \$8,011 semi-monthly; stated that annual orders were issued to the men either verbally or written to make inspection of the condition of all poles in the City of Richmond on which electrical wires were strung; that reports of the poles found to be defective were promptly sent to the Fire Alarm Department; he stated that one year the poles found to be defective were 47, another year more than 100, and another year only 8 poles. (Record, p. 90). But by stipulation of agreed facts (Record, p. 114) the following was agreed: "In 1910, 43 poles; in 1911, 111 poles; in 1912, 8 poles; in 1913, 1 pole; in 1914, 98 poles, and such reports were given to and filed with Superintendent of the Fire Alarm and Police Telegraph Department."

W. H. Thompson, being recalled, stated that he had in his office a report for December 15, 1911, received from the Police Department, and that when such reports were received he wrote to all the various companies, as their names appeared, calling attention to the defective poles belonging to each of said companies, and filed a copy of said letter to the several companies whose poles were found so to be defective. (Record, p. 91).

Geo. S. Crenshaw, Special Accountant of the City of Richmond, and at that time acting Auditor, stated that the aggregate total of revenues of the City of Richmond for the year 1912 were \$4,122,931, not counting \$464,937, which was carried over as unexpended from the previous year, and that the expenditures for the same year were \$4,303,516, thus leaving a balance of \$284,352; that for the year 1913 the appropriation for the maintenance of the Police Department was approximately \$192,000. (Record, p. 92).

The Captains of the Police Districts of the City of Richmond, Captain Barfoot, Captain A. S. Wright, and Captain Geo. W. Epps, were examined as witnesses for the appellant. The substance of the several statements made by them was that annual inspections were made by the men in each of their districts, and defective poles were reported as found. (Record, p. 92-4).

By Clause 18 of "Stipulation as to Agreed Facts," (Record, p. 37), it is provided as follows:

"18. That the printed record of the mandamus case hereinbefore referred to, together with the printed brief of counsel in said case, may be quoted in brief of counsel, read and relied upon in the Hastings Court or any appellant court, to which the case may be taken as if the same were fully set forth herein." See also Record, p. 60 and 114.

In the record in the said mandamus case, we find that W. H. Thompson, whose evidence in the proceedings instituted in the Police Court against the appellant for its failure to comply with section 19 of Chapter 88 of Richmond City Code, 1899, and appealed by the defedant therein to the Hastings Court of the City of Richmond, has been hereinbefore quoted from, testified concerning the issues in that case as follows:

"79 Q. What is a guy wire?

"A. A guy wire is more of a support wire; it is used to support poles that are set on an angle. For instance when you turn a corner at a sharp angle, a guy pole is set off at a distance and a guy wire is run from that to the pole at the corner.

"80 Q. Guy wires are bracers?

"A. Yes, sir, support wires.

"81 Q. State whether or not guy wires may not be a source of interference with the operation of the Fire Department in times of fire

"A. To both the Fire Department and to citizens at large, because guy wires as a rule are tied nearer the pavement than any other wires.

"82 Q. Is it or not an unusual thing for guy wires to become charged with electric currents?

"A. That occurs sometimes.

"83 Q. Are you sufficiently familiar with the condition of the wires of the Postal Telegraph-Cable Company, its poles and wires—that is, its wires of all sorts, guy wires, line wires and call wires—to state what inspection should be made of such wires and poles, in order to insure their safety and their proper maintenance?

"A. Yes, sir; we are constantly on the go inspecting wires; we are at it all the time, whenever we see anything at all wrong. As I said before, these companies are obliged to get a special permit to string wires, but they don't always do it, especially the Western Union; they haven't got a permit for months and months. They string wires, sneak them up, and we see them up, and it is considerable trouble to trace

them from house to house. As a rule, outside of call wires, the Western Union has trunk wires; they go from the office right through the city without stopping, except one or two branches they have on Broad street, and they are very easily inspected. Sometimes we find faulty construction, and decayed poles, things of that kind.

"84 Q. Has the Postal Telegraph-Cable Company any call wires strung across the city?

"A. Yes, sir; they have them *all over the housetops in the underground district*, and beyond the underground district—*especially in the center of the city*.

"85 Q. Have you any means of ascertaining how many call boxes they have in the center of the city?

"A. No, sir; I have not.

"86 Q. Does it, or not, become important that the wires connecting these call boxes with the central offices should be inspected, and the routes of them kept in your office?

"A. Yes, sir; by all means, because these wires enter houses, while the trunk lines do not enter houses in the city except their own building. Messenger call boxes are in a good many of the business houses.

"87 Q. Is it troublesome or an easy job to inspect the call wires and ascertain whether they are properly safely installed?

"A. It is almost impossible to inspect them properly. They are using housetop fixtures and get out of the way of the poles. As a rule, property owners will not allow telegraph people to go on top of their house if they know it. It is hard to inspect them unless trouble happens.

"88 Q. What trouble happens?

"A. They are liable to have crosses and burning out of the fuses, which, of itself, doesn't amount to much, but it is a scarecrow to persons having call boxes in their houses.

"89 Q. Are these wires troublesome when fires occur?

"A. *They are the hardest things we have to deal with.* It is hard to tell the owners of wires after dark, and we can't tell whether there is a current on them until we run afoul of them.

"90 Q. Are they insulated wires?

"A. In some places they are; in many places there are wires that have been up for years, and the insulation on the wires has been destroyed.

"91 Q. Would it, or not, be a serious expense on the part of the City of Richmond to have all the wires of the Postal Telegraph-Cable Company regularly and properly inspected?

"A. Yes, sir; it would entail a great deal of trouble and expense—not the trunk lines, but the messenger call service, the local service.

"92 Q. Are these wires supported on poles?

"A. In some cases they go on poles for a short distance, but the bulk of them are *on housetop construction*.

"93 Q. Will you please state how many poles the last report of the Postal Telegraph-Cable Company shows are occupied by that company in the streets, alleys, and parks of the city?

"A. I don't think I can give you that exactly. It is somewhere in the neighborhood of one hundred and seventy-five or two hundred and five, somewhere along there—it will not exceed two hundred.

MR. TAGGART: That, you mean, for the whole city?

WITNESS: For the whole city.

By MR. POLLARD:

"94 Q. At the rate of two dollars a pole, the inspection fees would amount to about four hundred dollars, would it?

"A. Yes, sir.

"95 Q. State whether or not four hundred dollars would pay the expense of an adequate inspection of all of the poles, wires and lines of this company in Richmond?

"A. Only their poles line; it would cover the expense of inspecting their pole lines possibly, *but not the houstop construction*.

"96 Q. I understand you to say that it is important to the safety of property and life that the housetop construction, as well as the pole, construction, should be inspected. Am I correct in this.

"A. You are correct." (Record, Mandamus Case, p. 125-127.) * * *

"29 RDQ. Who is the City Electrical Inspector?

"A. William H. Minor.

"30 RDQ. Is he an efficient man?

"A. I don't know of any better.

"31 RDQ. Is he, or not, actively engaged in the discharge of his duties in this respect?

"A. Yes, sir; constantly.

"32 RDQ. State whether or not, in your opinion, one

electrical inspector for a city of the size of Richmond is sufficient?

"A. Not if he is expected to maintain the other branches of the electrical service owned and controlled by the city. One man may possibly do the work, if he confines himself to inspections only. Of course, I have other duties. We have *five men* in the department, and they are *all* kept busy *all the time*.

"32 RDQ. Is it the duty of any of the men, other than Mr. Minor, to inspect electrical construction?

"A. I use them all for the purpose, according to their ability, and the class of work I want inspected. Mr. Minor is supposed to be the chief inspector, especially on interior work of houses. The Assistant Superintendent in my department looks mostly to the outside construction.

"34 RDQ. Is it in the purview of his duty that he should inspect poles and wires as to their soundness and stability and proper condition from a mechanical, as well as an electrical standpoint?

"A. All six men in my department have positive orders to be on the alert at all times, and report any and everything that they may see out of order, in regard to dangerous poles.

"35 RDQ. Give some idea of what it costs the City of Richmond to maintain this department for the inspection of electrical wires and electrical construction of all sorts, in the city, in the aggregate?

"A. I think it is in the neighborhood of \$7,000.00.

"36 RDQ. Does that include the maintenance of horses and wagons and teams which are necessary?

"A. Yes, sir, that takes in the whole business.

"37 RDQ. And the salaries of the officers?

"A. Yes, sir; and salaries.

"38 RDQ. Also the rent of proper apartments?

"A. No, sir; I am not going into any details about it—just giving it in a general way.

"39 RDQ. They occupy, I presume, offices in the City Hall, do they not?

"A. Yes, sir.

"40 RDQ. To maintain quarters outside of the City Hall would not that add largely to the expense of the department?

"A. Materially so, sir.

"41 RDQ. How much?

"A. Oh, I suppose a couple of thousand dollars.

"42 RDQ. So, then, the expense of maintaining an electrical inspection in the city is not less than \$9,000 to \$10,000, am I correct?

"A. Yes, you are correct." (Record, Mandamus Case, pp. 214-216).

Giving due consideration to the foregoing evidence of the witnesses examined by the City of Richmond to establish the fifth item hereinbefore laid down as the necessary expense incident to maintaining a constant inspection of the poles and wires of the company for the purpose of seeing that they are safe, seems to us fairly to justify the reasonableness of the charge. This leaves out of view entirely the five other items which the courts have held to be proper for consideration.

On page 18 of the brief of opposing counsel on the motion to dismiss, it is said:

"It appears from the record that there is no special inspection or supervision of the poles except by the regularly employed officers of the city with little or no additional expense, and that the license fees exacted from the appellant in the ordinance are greatly in excess of any amount necessary for police inspection or supervision. In fact, this does not seem to be seriously controverted in the case."

What boots it if the inspection which has undoubtedly, according to the oral evidence, consumed the larger part of the time of one department of the City Government and a considerable portion of the time of another department (Police Department), was made "by the regularly employed officers of the City," and where, may we ask, does it appear in the record that such inspection by the regularly employed officers was done, or could be done, with little or no additional expense. With no disposition to be censorious or in the least offensive to the learned counsel, the limit is reached, it seems to us, in the last sentence of the foregoing quotation, and therefore we feel justified in challenging this statement and request that the learned counsel will state, in the face of the persistent effort of the City of Richmond, in court and out of court, to demand a compliance with the ordinance which the City of Richmond believes to be constitutional and valid in every respect.

Concerning the proprietary right of the municipality for which a charge may be made, Mr. Justice Brewer, in *St. Louis v. Western Union*, 148 U. S. 98, 101, said:

"It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from

the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

Thus overruling the contention made in that case as in this case, that the appellant being engaged in interstate commerce, could not be required to make compensation to the State or city having the control of the public property, as the case may be, adding:

"This is not the first time that an effort has been made to withdraw corporate property from State control, under and by authority of this Act of Congress."

Probably the soundness of no two decisions of this Honorable Court have ever been so continuously and persistently combated as its deliverances in the cases of *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92 and *St. Louis v. Western Union Telegraph Company*, 149 U. S. 465. The appellant, losing in both of these cases, has again and again, in many courts, State and Federal, of high and low degree, brought under review the principles there, as we think, distinctly settled.

In these cases one of the questions which arose was the validity of the provision in the ordinances of the City of St. Louis, denominated as ordinances No. 11,602, which brought under review the reasonableness of the requirement to give the City of St. Louis the use of space upon the telegraph poles of the telegraph company and the requirement was held to be valid.

In the case of *Postal Telegraph-Cable Co. v. Chicappee*, 207 Mass. 341, S. C. 93 N. E., 927, (decided in 1911) which required a telephone company, as a condition to receiving a license, to place poles on a city street, to permit the municipality to use them to carry its fire alarm and electric light wires without compensation, it was held that this was not unreasonable where the benefit to the municipality does not exceed the cost of inspecting the poles to keep them safe from travelers, and the risk it runs of being held liable for them for injuries, because of the presence of the poles in the street; and it is immaterial that the high current of the light wires renders greater care necessary on the part of employees at work upon the poles, and makes possible inductive disturbance in the telephone line, which may require its owner to maintain a higher voltage than it otherwise would.

And it was also held that it was not unreasonable interference with interstate commerce to require a *telegraph company*, as a condition to receiving a license to place poles to carry its wires in the city streets, to permit the city to place on the poles, without com-

pensation, wires necessary for its fire alarm and electric lighting systems, where the detriment to the telegraph company is no greater than the reasonable cost of inspecting the poles necessary to keep the streets safe for travelers.

In this case it was said by Knowlton, Chief Justice, delivering the opinion of a unanimous court:

"If these requirements of the ordinances were not unreasonable or invalid, under the statutes of this Commonwealth, it follows almost necessarily that they were not an interference with interstate commerce. They were adopted in the exercise of the police power, in reference to a local matter of public importance, about which Congress had taken no action. In *Western Union Telegraph Co. v. Pendleton*, 122 U. S., 347-359, it was said that within the limitation that it does not encroach upon the free exercise of the powers vested in Congress by the Constitution, a State may undoubtedly make all necessary provisions with respect to the buildings, poles and wires of telegraph companies in its jurisdiction, which the comfort and convenience of the community may require." A provision almost identical with that in the present case was upheld in *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92, and was assumed to be reasonable on the rehearing of the case in 149 U. S. 465, and in the opinion in *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419. In the first of these cases an additional requirement of a money payment by the telegraph company to the city was upheld, on the ground that it was to be treated as rent for the 'absolute, permanent and exclusive appropriation' of space in the streets.

* * * * *

"It is well established that a police regulation of a State, affecting interstate commerce only indirectly, in a field which has not been occupied by congressional legislation, is not a regulation of such commerce within the implied prohibition of the Constitution of the United States. *Mississippi R. Commission v. Illinois C. R. Co.*, 203 U. S., 335; *Lake Shore and Michigan Southern R. Co. v. Ohio*, 173 U. S., 285-298. All that has been done by the defendant under this ordinance seems to have but a slight and incidental effect upon interstate commerce, through the imposition of a local regulation of the use of the streets, for the purpose, *primarily and principally, of preventing the erection of unnecessary and ob-*

jectionable poles to the obstruction of travel; and, secondarily, to provide compensation for the expense to the city for inspecting the line of telegraph for the protection of the public."

Referring again to the case of *Memphis v. Postal*, 76 C. C. A. 292, S. C. 145 Fed. 602, it is proper to call the attention of the court to the fact that this hearing of the case was the second time that the same had been under consideration. The Master in the court below having been directed to inquire "whether the rental of \$2.00 per pole per annum from 1896 to 1900, inclusive, and that of \$3.00 per pole per annum since 1902, were unreasonable and excessive," in response to which he held that both of these rentals were reasonable when laid, but held that \$2.00 per pole was inadequate after the ordinance fixing the rental at \$3.00 was passed, the trial court having overruled the Master and held that the rental of \$2.00 was reasonable, but that the rental of \$3.00 per pole was unreasonable and excessive. On appeal (91 C. C. A. 135, S. C. 164 Fed. 600) in determining this question Circuit Judge Richards, (Circuit Judge Lurton, sitting and concurring), used the following language:

"We have given careful consideration to the re-argument of the fundamental questions, whether the city had the authority to pass the ordinances of 1894 and 1902, and we are constrained to stand by the conclusion which is set out clearly and with sufficient authority in the opinion in 145 Fed. 602, S. C. 76 C. C. A. 292."

* * * * *

"We are clear in the opinion that it should be settled in favor of the conclusion reached by the Master. The increase of the rental under the second ordinance may well be justified by general conditions. What was a fair estimate of the rental per pole which should be charged per annum, under the circumstances, seems to have been a matter of opinion. The witnesses were not permitted to take into account any element of value resulting from the consideration that the occupation and use of the poles by the company was either a privilege or a license. This appears to have resulted from the fact that the right being exercised was proprietary in its nature, and for this right a rental should be charged. But at the same time that the witnesses were restricted in the way we have indicated, their attention was not directed to the fact that the

proprietary right of the telegraph company was not restricted to the occupation and use of the ground where a pole stood merely; and you could not properly limit the value of that occupation and use by the size of the pole. The pole carried cross-arms, and the cross-arms insulators and wires. The cross-arms, insulators, wires and cables enjoy a part of the proprietary right of the company, as well as the poles."

In the face of the holding of the court in that case the appellant here has asked that an ordinance which imposes only \$2.00 per pole per annum in the City of Richmond, which, by the last United States census (of which the court may take judicial notice) had a population of 127,668, now with an estimated population as of July 1, 1918, of 160,813, that being largely in excess of the population of Memphis by the census of 1910, when its population was given as 131,105, be set aside and annulled as unreasonable, although the courts, with one voice held that in order to justify the invalidity of an ordinance imposing a burden of the kind complained of, on account of its being unreasonable, it must be shown that the same is so "grossly disproportionate to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure and not a police regulation;" per Mr. Justice Peckham, in *Postal Telegraph Cable Co. v. Taylor*, 192 U. S. 64, 68, 69.

Another case of great significance in this controversy is the case of *Ganz v. Postal Telegraph Cable Company*, 140 Federal 692, in which Circuit Judge Richards, delivered the opinion of the court (Mr. Justice Lurton sitting and concurring.) The following holdings were there made:

"(a) The primary purposes of a highway being for travel and transportation, its use by a telegraph company to facilitate communication is subordinate to its use by the public for such primary purposes.

"(c) The right given to telegraph companies by the act of Congress to use post roads for their lines, on compliance with certain conditions, is permissive only and the statute was not intended to interfere with the proper control and regulation of highways by the States, counties or municipalities which have them in charge.

"(d) Under the statutes of Ohio, which provide that the use of a public road by a telegraph company 'shall not incommode the public in the use of such road' a board of

county commissioners, which has been given control of a pike by the State, cannot grant to a telegraph company the right to maintain its poles and wires thereon, except subject to such statutory limitation; nor will such a grant preclude it or a succeeding board from ordering a removal of such poles and wires, if, at any time, through changed conditions, their location on the highway shall incommode the public in its use, and such action in ordering a removal will not be interfered with by the courts, unless an abuse of direction is shown."

In the opinion of the court, it is said:

"It is established by numerous decisions that the statute is permissive only. It was not intended by its passage to interfere with the proper control and regulation of such highways by the States, counties or municipalities which had them in charge."

Citing many cases already cited in this brief, and the following not heretofore cited:

Michigan Telegraph Co. v. Charlotte, 93 Fed. 11;

Toledo v. Western U. Telg. Co., 107 Fed. 10.

A case also of much importance is the case of *Postal, etc., Co. v. Baltimore*, 79 Md. 592, where the charge was \$5.00 per pole, appealed to this court and reported in 156 U. S. 210. Chief Justice Fuller, on a motion to dismiss or affirm, made short work of the determination of the question, his opinion consisting of but one short sentence, he said:

"The judgment is affirmed upon the authority of *St. Louis v. Western Union Telegraph Company*, 118 U. S. 92."

To persons other than the able and aggressive counsel for the appellant, it seems that the court had reached a point where it was thought that the questions presented by that record which are practically the same as those presented by this, "should be considered as settled."

Indeed the counsel who appeared for the company, (The Postal Telegraph Cable Company and not the Western Union Telegraph Company) as shown from a report of their contention before the Supreme Court of Maryland, admitted that the question was settled, unless it was true that the decision of the *St. Louis* case rested on the ground that the city of *St. Louis* had greater powers

over its streets than ordinarily belong to municipalities, but, as said, the court firmly and briefly rejected that suggestion and placed Baltimore on the same plane with that city.

It is laid down in 27 American and Eng. Ency. L., p. 1021, that:

"THE MUNICIPALITY MAY PROVIDE FOR AN INSPECTION of the company's lines within its limits, and require it to pay, annually, a sum reasonably sufficient to cover the cost of such inspection by a municipal officer."

These propositions are, undoubtedly, sustained fully by the authorities. See *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465; *Postal Telegraph Cable Co. v. Baltimore*, 79 Md. 502, affirmed in 156 U. S. 210; *Allentown v. Western Union Telegraph Co.*, 148 Pa. St. 117; *Chester v. Western Union Telegraph Co.*, 154 Pa. St. 464, and *Western Union Telegraph Co. v. Philadelphia*, 12 Atl. 144."

In *Chester v. Western Union Telegraph Company*, 154 Pa. 464, the Supreme Court of Pennsylvania declares that the reasonableness of a license fee for a telegraph company may be measured partly by the liability of a city for injuries caused by defective poles and wires as well as by the actual amount of expense for licenses.

In *Philadelphia v. American Union Telegraph Co.*, 167 Pa., 406, it was held that the fact that the charge was more than ten times the cost of regulation, and of all outstanding expenses, including liability for damages, loss and expenses of every nature, is not sufficient to defeat the right to collect the tax.

The New York Supreme Court refused to hold that the charge made by the Philadelphia ordinance for police regulation and supervision was unreasonable, and held that that charge did not constitute a restriction on interstate commerce. *Philadelphia v. Postal Telegraph Cable Company*, 67 Hun. 21.

While it is true that in the case of *Philadelphia v. Western Union Telegraph Co.*, 81 Fed. 948 and 82 Fed. 797, the Philadelphia ordinance was held invalid as unreasonable and in excess of the cost of inspection and regulation, yet, on writ of error from the Circuit Court of Appeals this judgment, was reversed because the lower court had refused to admit, upon the question of the reasonableness of the ordinance, evidence of the additional expense for fire apparatus rendered necessary by the suspension of electric wires in the streets, and of the necessity of extra meetings of the council for the purpose of regulating the suspension of poles and wires. *Philadelphia v. Western Union Telegraph Co.*, 32 C. C. A.

246, S. C. 89 Fed. 151. The court said that *a wide scope should be given to the admission of evidence upon the question of the reasonableness of a license fee imposed by municipal ordinance upon poles and wires of a foreign telegraph company.*

In *Western Union Telegraph Company v. New Hope*, 187 U. S. 419, it was held that:

"An ordinance imposing a license fee on telegraph poles and wires within the limits of the municipality is not obnoxious to the commerce clause of the Federal Constitution when applied to poles and wires used for interstate business, although it yields a return in excess of the amount necessary to re-imburse the municipality for the cost of supervision and inspection."

From this last quoted case on pages 425-6, we beg to make the

following quotation from the opinion of Chief Justice Fuller:

"In *Chester City v. Western U. Teleg. Co.*, 154 Pa. 461 S. C. 25 Atl. 1734, in which it was averred in the affidavit of defense that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the Supreme Court said: 'For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to the usual ordinary or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. *It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of duty, an action might lie against the city for the consequence of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit.*'"

In *Taylor v. Postal Teleg. Cable Company*, 20² Pa. 583, S. C. 52 Atl. 128, the Supreme Court of Pennsylvania said:

"Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense

incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. * * *

"Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise, and the expense of the same." And see *Philadelphia v. Western Union Teleg. Co.*, 32 C. C. A. 246, 89 Fed. 454.

"Concurring in these views in general, we think it would be going much too far for us to decide that the test set up by the plaintiff in error must be necessarily applied, and the ordinance held void because of failure to meet it. As the Supreme Court pointed out, *the elements entering into the charge are various, and the Court of Common Pleas, the Superior Court and the Supreme Court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition.*

"This license fee was not a tax on the property of the Company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local government supervision, and as such, not in itself obnoxious to the clause of the constitution relied on. *St. Louis v. Western Union Telegraph Company*, 118 U. S. 92, 149 U. S. 465."

By analogy what is said by Judge Dillon in his work on Municipal Corporations concerning the imposition of a charge against a telegraph company for the construction and maintenance of poles in a street in which the wires of a company are required to be placed, is apposite. He says:

"But while the authority to require electrical conductors to be removed and placed underground may be delegated to cities and villages, such surrender of authority by the legislature is not to be implied, but must rest on legislation containing a clear grant of the power. In providing for the removal of overhead wires, the legislature may, by virtue of the police power, authorize the construction, and the city may by virtue of the power so conferred, build conduits in which all companies having the franchise or right to use the streets

for electrical conductors shall be required to place their wires, and these companies may be denied the right to build independent conduits under their own charters, although the charters may be prior in point of time to the statutes or ordinances requiring the placing of the wires underground. And it is also within the legislative power to provide that the expense of constructing the conduits as well as the expenses of a commission appointed to carry out the provisions of the statute, shall be borne by the companies whose wires are to be placed in conduits. Such a statutory provision is not the exaction of a tax, but it is merely a regulation in the public interests of the manner in which the companies shall meet the expense of the necessary changes." (3 Dillon, 5th Ed., Sec. 1271).

Among the cases referred to to sustain the proposition is that of *Western Union v. Pa. R. Co.*, 195 U. S. 506. In that case at page 575, it was said by Mr. Justice McKenna in closing a very able opinion, affirming a decree of the United States Circuit Court for the Third Circuit, 59 C. C. A. 113, S. C. 123 Fed. 33:

"We cannot but feel, therefore, that there is something inadequate in the argument which is based on the apprehension that the act of July 21, 1866, construed as we construe it, gives a *sinister* power to railroad companies. It gives no power to those companies but that which appertains to the ownership of their property."

So we say here, the "*sinister*" motives attributed, with a freedom rarely surpassed, to the conduct of the City of Richmond in the matter of enforcing its rights under the many cases quoted above in favor of the legality and reasonableness of the charge for the occupation of its streets, construed as the courts have construed it, is utterly inadequate to sustain such charges as against the City of Richmond.

Mr. Joyce, in his work on *Electric Law*, sums up the holdings and results of numerous cases involving the power of regulation of the use of streets and other public places by persons or corporations engaged in interstate commerce, as follows:

"From the cases which have arisen under these acts the following general propositions of law may be deduced: 1. The legislature of a State may, in the exercise of its police power, require electrical wires to be placed underground. 2. The municipal authorities may, under a proper delegation of power, require electrical wires to be placed underground.

3. Such acts may be made to affect not only companies subsequently organized, but those already maintaining poles and wires upon the streets. 4. Acts of this nature do not deprive companies formed under the Post Roads Act of Congress of any of the rights or privileges conferred upon such companies by that act. 5. Acts of this nature do not conflict with the powers of Congress in reference to post roads. 6. Acts of this nature are not in conflict with the paramount right of the National Government to control and regulate interstate commerce. 7. The removal of poles and wires from the streets by the municipal authorities, in pursuance of an act requiring them to remove them, if not removed by the companies within a certain time, is not a taking of private property without compensation. 8. Nor is such removal a taking of property without due process of law, and in violation of the Fourteenth Amendment to the Federal Constitution. 9. The electrical companies may be required to pay the salaries of subway commissioners, and this is not a taking of property without due process of law, and in violation of the Fourteenth Amendment. 10. Acts classifying the cities, as in the New York Subways Act, are not local or private laws, although they may be applicable to only one city. 11. Acts of this nature are a proper exercise of the police power."

The views stated by the highest court of the State of New York and by the learned writer (Joyce), are in harmony with the decisions of this court. Only a few of the many cases bearing thereon need be cited.

In *New York v. Squires*, 145 U. S. 175, 190, it was said by Mr. Justice Lamar:

"They simply said to it, '*Submit your plans and specifications of your electrical system to the board of subway commissioners, who will determine whether they are in accordance with the terms of the ordinances giving you the right to enter and dig up the streets of the city. This the statutes had a right to do.*' It would be an anomaly in municipal administration, if every corporation that desired to dig up the streets of a city and make underground connections for sewer, gas, water, steam, electricity or other purposes, should be allowed to proceed upon its own theory of what were proper plans for it to adopt, and proper excavations to make. The evils that would follow such a system of practice would be of great gravity to the public, and would entail endless disputes and bickerings with prior parties having equal rights."

In the case of *Western Union Tel. Co. v. Penn. R. R. Co.*, 195 U. S. 540, 557, the court places telegraph companies in regard to their right to occupy public or quasi-public property, on the same footing with such rights as to private property.

Without for a moment conceding that the police power of the State or of a municipality, where that power had been delegated to it, as is here the case, is not greater than any other power resident anywhere, and that it will be so recognized by the courts, we submit that a municipality cannot, if it would, divest itself of its power to protect the lives and property of its inhabitants. Any attempt to do so would be *ultra vires*.

In *C. B. & Q. Ry. Co. v. Nebraska*, 170 U. S. 57, 72, this Honorable Court said:

"The presumption is that when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature—a principle which has been fully recognized in the case of *New York v. Bristol*, 151 U. S. 556. There the court said: 'The governmental power of self-protection cannot be contracted away.'"

We, therefore, for the foregoing reasons, submit that the rental fee imposed under the ordinances of the City of Richmond, referred to in the record, are valid and constitutional and may be enforced, and that the injunction asked against their enforcement in the bill of complaint should be refused and that the decree of the court below, should be affirmed.

THIRD.

The ordinance of the City of Richmond imposing a license tax of \$300 upon the appellant for maintaining an office in the City of Richmond is not unconstitutional as alleged in the bill of complaint.

At the time of the granting by the City of Richmond to the Postal Telegraph-Cable Company (March 16, 1889), the use of the streets, alleys and other public places of the City, it was provided by section 1042 of the Code of Virginia, 1887, as follows:

"Sec. 1042. Licenses—*In addition to the State tax on any license, the council of a city or town, may, when anything for which a license is so required, is to be done within the city or town, impose a tax for the privilege of doing the same, and require a license to be obtained therefor; and in any case in which they see fit, require from the person licensed bond with sureties, in such penalty, and with such condition, as they may deem proper, or make other regulations concerning the same.*"

And by section 67 of the Charter of the City of Richmond, it was provided as follows:

"67. The council may tax the keepers of ordinaries; houses of entertainment, * * * and any other person or employment upon whom or upon which the State may at the time have imposed a license tax. And as to all persons or employments embraced in this section, the Council may lay the tax directly, or may require them to take out a license, under such regulations as may be prescribed by ordinance, and impose a tax thereon," etc. (Charter and Ordinances of the City of Richmond, 1869; Acts of the General Assembly of Virginia providing a Charter for the City of Richmond, February 24, 1866; March 19, 1867 and April 15, 1867).

Turning now to the Act of the General Assembly of Virginia imposing taxes on telegraph companies, in force at the time of the approval of the said ordinance of March 16, 1889, it will be found that the State of Virginia, by the Tax Bill, approved March 15, 1884, imposed a license tax upon telegraph companies for the privilege of operating for compensation the apparatus necessary to communicate by telegraph, of \$250, and an additional charge of 1 per cent. of the gross earnings the company received, or due though not received, from their business in the State during the preceding year; provided, however, that said sum should not be required of companies whose gross receipts are less than \$1,000. (Acts of the General Assembly of Virginia, 1883-4, p. 575).

Under the ordinance of the City in force at the time of the granting of the said franchise to the said appellant, it was provided as follows:

"14. Express companies and telegraph companies, having a place of business in the City, shall be divided into four classes, and pay a license tax, if of first class, of five hundred dollars; second, two hundred dollars; third, one hundred and twenty-five dollars; fourth, fifty dollars.

"15. The committee on finance shall classify all persons prosecuting, or proposing to prosecute, any business assessed with a class tax, in performing which duty they may require the attendance and advice of the commissioner of the revenue, the collector or any city officer." (Richmond City Code, 1885, p. 76).

By subsequent ordinances said section 14 was amended so as to provide a different classification of telegraph companies liable to the payment of a license tax so as to provide a tax of \$300 as a license tax to be paid by the companies in the third class, in which class, by the action of the Committee on Finance, the appellant was placed, and is the assessment of which the appellant complains in its bill.

It thus abundantly appears that the City of Richmond had conferred upon it both by general statutes, and by the Charter of the City of Richmond, the right to impose a license tax, and that by the ordinance referred to above, said tax was duly imposed.

The ground upon which the legality of the tax is complained of is stated in the bill and in the brief of counsel. But before addressing ourselves to the discussion of this question it may not be amiss to say in passing that the above quoted sections authorizing a classification of persons or corporations from whom a license tax may be required to be paid, was vigorously attacked as unconstitutional in the case of *Bradley v. Richmond*, 227 U. S. 477, 482-4, on an appeal from a decision of the Supreme Court of Appeals of Virginia (110 Va. 521) where the constitutionality of said provisions was likewise upheld.

It is charged in the bill:

"That while the said license tax purports to be levied only upon business destined from the Richmond office to points within Virginia, and upon business originating within the State of Virginia, and subject to delivery at the Richmond office, that as a matter of fact, in addition to being excessive and confiscatory, it is violative of the guaranteed constitutional right which inures to and in favor of this company to maintain an office in the City of Richmond for the purpose of engaging in the business of interstate commerce for which it was chartered, and is violative of the right of the complainant company to carry on interstate commerce unhampered and unimpeded; that the right thus involved is a valuable right, worth to complainant many thousand dollars—worth certainly in excess of three thousand dollars; and that if the defendant municipal corporation is allowed to exact

the said excessive license fee that it is destructive and will be destructive of the right of this complainant corporation to maintain an office in the City of Richmond for the transaction of the business for which it was chartered, and that in the face of such license exaction in addition to the other taxes imposed by law, it will be impossible for the complainant company to maintain such an office without actual loss." (Record, p. 5).

This allegation in the bill was positively denied in the answer. (Record, p. 17).

Inasmuch, as in this suit, the appellant is attacking not the original ordinance but an ordinance amending the section in force at the time of the granting to the complainant of the right to occupy the streets of the City of Richmond, it is proper to call the attention of the court to the amendments made between the passage of the original ordinance and the amended ordinance filed with the complainant's bill as Exhibit A, at page 10 of the Record.

By the ordinance, approved February 17, 1900, the business for which a license tax may be imposed upon telegraph companies was expressly confined to business done within the City of Richmond, but not to include "any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents" (Certain Resolutions and Ordinances of the Council of the City of Richmond, 1898-1900, p. 143), said amendment, appearing in the said ordinance filed as Exhibit A, is the one to which the complainant objects as illegal and unconstitutional.

The principal case relied on by us to sustain the validity of the ordinance here complained of, is the case of *Postal Telegraph Cable Co. v. City of Charleston*, 153 U. S. 692, in which it was held that a license tax of \$500 upon a telegraph company which had accepted the provisions of the Act of July 24, 1866, upon business done exclusively within the City and not including business done to or from points without the State, and not including any business done for the Government of the United States or its officers or agents, is a valid exercise of the police power and is not an interference with interstate commerce.

In this case Mr. Justice Shiras delivered the opinion of the court. He reviewed, as it seems to us, all of the principles determined by this Honorable Court that bear upon the contention there made, which is exactly the same as the contention here made. Meeting the contention that the tax would be "confiscatory" the court said:

"If business done wholly within a State is within the taxing power of a State the courts of the United States cannot review or correct the action of the State in the exercise of that power."

This is substantially what was said by Keith, P., in closing the opinion of the court in the case of *Postal v. Norfolk*, 101 Va. 125, 134:

"When we consider the amount of business transacted by the Postal Company within the City of Norfolk, and within the State of Virginia, it may be conceded that the taxes imposed upon it in various forms are onerous and oppressive, but the law operates upon all alike, is not repugnant to the Constitution of the United States or of the State of Virginia, and there is no ground upon which we can hold it to be invalid. If it be a grievance it is one which cannot be redressed by an appeal to the courts, but to the sense of fairness and justice of the law making power."

And continuing, Mr. Justice Shiras, in *Postal v. Charleston, supra*, pointed out the distinction to be observed between the control of a telegraph company in regard to its interstate business and the same company while conducting an intrastate business. He said:

"It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the Act of Congress as an agency of the Government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866, (Rev. Stat. secs. 5263-5268) are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the State in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited."

It was upon the doctrine of these cases that the court below acted in refusing the injunction and dismissing the bill," citing the Charleston case. (153 U. S. 700).

It is evident by a comparison of the Richmond ordinances with the Charleston ordinance, that the two ordinances are not

only substantially the same in *verbiage*, but also in *intent and meaning*. See *Postal Telegraph-Cable Co. v. Charleston, supra*, 693-4.

In endeavoring to establish that the license tax imposed by the city is invalid, the Company has not undertaken to prove facts establishing such invalidity, but has relied upon presumptions derived from other and different circumstances and conditions.

A case in point is the very recent case of the *General Railway Signal Company v. Commonwealth of Virginia*, 216 U. S. 500, 510, 511, where Mr. Justice McReynolds, delivering the opinion of the court, said:

"We think the recited facts clearly show local business separate and distinct from interstate commerce within the doctrine announced and applied in *Browning v. Wajcross*, 233 U. S. 16." Citing *St. Louis, etc., R. Co. v. Arkansas*, 235 U. S. 250 and other cases and adding:

"The two characteristics of the statute just referred to must be regarded as sufficient to save its validity."

In the case of *Postal Telegraph-Cable Co. v. Norfolk*, 101 Va. 125, we find that the language imposing a license tax on the Postal Company provided that, "Any person, firm or corporation who shall engage in the business of sending telegrams from the city of Norfolk to a point within the State of Virginia, or receiving telegrams in the city of Norfolk from a point in the State of Virginia, excepting, however, telegrams sent to or received by the Government of the United States or this State, or their agents or officers shall pay a license tax of \$250," etc., it being provided further on in the ordinance that "Nothing in this ordinance shall be construed as imposing a license tax on, or otherwise regulating or restricting foreign or interstate commerce," (per Keith, P., p. 128).

Concerning these provisions, the learned President, delivering the unanimous opinion of the court, said:

"The case seems to us to be ruled in this respect by the decision in *Postal Telegraph Co. v. City of Charleston*, above cited." (p. 132).

The appellant, in keeping with its persistent and continued objections to the ordinances of the City of Richmond, was not content with said decision in 101 Va. 125, but again went into the courts and refused to comply with an ordinance of the City of Norfolk, being an amendment to the former ordinance only in the particular that it imposed a higher license tax (\$500) and in addi-

tion \$1.00 per pole on each and every pole and \$1.00 on every 100 feet of conduit laid in the streets of Norfolk owned or used by it and being summoned to the Police Court a fine was there imposed and the Company took an appeal to the Circuit Court of the City of Norfolk where the judgment of the Police Court was affirmed. From this judgment it appealed again to the Supreme Court of Appeals of Virginia where the judgment of the Circuit Court was affirmed and the case is reported in 118 Va. 455.

In that case Kelly, J., at page 457, delivering the opinion of the court, and admitting that it appeared from the evidence that the cost of inspection and supervision exercised by the City over the property of the company was "very small" and for that reason the company contended that the charge was excessive, said:

"We do not think the tax in question can be regarded as an inspection tax. The city claims that the business of the company 'cannot be reached by the *ad valorem* system,' (Va. Const. sec. 170), and that this tax was a revenue measure and was charged for the privilege of doing business in the City. This would seem to be the correct interpretation of the ordinance."

And adding:

"Nor is there any merit in the contention that a license tax for revenue, as this one clearly is, results in double taxation when the properties owned by the company and employed in its business have also been subjected to an *ad valorem* tax. This question is so well settled by the decisions in this State that we need not do more in this connection than to mention a few of them."

The second ground urged by the company was that the license tax in question, as it was denominated, was an illegal burden upon interstate commerce (the company doing a large interstate business) and is also confiscatory and hence violates the United States Constitution.

In answer to this the court said:

"The soundness of this position depends, in our view of the case, solely upon the correctness and sufficiency of the method used by the company in its effort to demonstrate, as a matter of calculation or bookkeeping, that the tax is a burden on interstate commerce and confiscatory as alleged. The calculation adopted by the company shows, according to

figures taken from the evidence and employed in the petition, that the tax exceeded the net income from the intrastate business at the Norfolk office for the year 1912 by the sum of \$1.82, allowing nothing for interest on investment, and, according to figures taken from the evidence and employed in the reply brief for the company, the calculation shows a deficit of \$13.00 if no interest be allowed on investment, and \$48.55 if such interest be allowed. We shall not go further into the figures testified to by the company's witnesses than may be necessary to show the principles upon which these results depend."

It thus appeared that the court rejected the process by which the company reached a conclusion satisfactory to itself, that the charges made in the Norfolk ordinance were confiscatory. By this process it claimed that the evidence showed that the taxes imposed upon the company in the City of Norfolk exceeded the revenue of the company for the business done in said City by the sum of \$1.82, and in concluding the argument on this subject at page 459, the court, per Kelley, J., said:

"The vice of the method consists in the assumption that the cost of intrastate business in relation to the company's revenue bears the same ratio as its interstate business to the total cost. There may be, for all we can say from the evidence before us, a decided difference between the proportionate cost of the intrastate and the interstate business, *depending upon the rates charged and other considerations, as to none of which is there any proof in the record.*"

Citing the cases of *Wood v. Vandalia Railroad Co.*, 231 U. S. 1, and *Woolf v. Chicago, etc.*, 230 U. S. 474. An examination of these cases will show that the court was thoroughly justified in relying upon them as authority in the premises.

In the latter of the two cases attention is specially called to syllabi 8 and 9 and to the language of Mr. Justice Hughes delivering the opinion of the court at page 500. He there said:

"It is clear that testimony of this general character cannot be deemed sufficient to support a finding of confiscation, or to justify the annulment of the legislative acts of the State."

And again at page 501 he says:

"Manifestly, a finding of confiscation could not be based on such a valuation *in the absence of clear and convincing*

proof that the value actually existed, and that the different items of property were estimated respectively by correct methods, and in accordance with proper criteria of value. This proof was lacking."

Referring again to the case of *Wood v. Van Dalia R. Co.*, 231 U. S. 1, we beg to repeat under this head what was said under the foregoing head, namely, that the ratio of certain operating expenses to the rate that should be charged on interstate commerce business furnishes no sufficient basis for finding that the rates are exorbitant. At pages 6 and 7 of the opinion of the court, delivered by Mr. Justice Hughes, it is said:

"In these circumstances, the ratio of total expense to total earnings affords, in itself, no sufficient basis for determining the cost of the transportation of the particular traffic covered by the order under review. It alone furnishes no ground for invalidating the finding of the commission that the existing rates were exorbitant and that the substituted rates would be fair. Before such a ratio could properly be used in setting forth the cost of a specified portion of the traffic, it would be necessary to have evidence either justifying the conclusion that the cost, in proportion to the revenue, was substantially the same for that part of the traffic as for the whole, or that there was a material difference, satisfactorily showing its nature and extent."

Thus for the second time, in the inferior, as well as in the Supreme Court of Appeals of Virginia (118 Va. 455), the appellant met with defeat, but after the determination of this case (January 13, 1916), the appellant, on the 2nd day of October, 1916, instituted these proceedings in the United States District Court, with the hope, no doubt, of meeting the objection made by Kelly, J., in deciding the Norfolk case, (118 Va. 455) and brought forward in his bill as well as in his brief on the motion to dismiss, substantially the same itemized statement, attempted to be sustained by the affidavits of two of the officers of the company, but it is submitted that when these affidavits are examined *it will be seen that they do not meet the fundamental objection made to such evidence by Mr. Justice Hughes deciding the two cases relied upon by him and above cited, and by the learned Judge of the Supreme Court of Appeals of Virginia, heretofore referred to and thereby left the matter in confusion "worse confounded."*

Yet it is insisted on page 3 of the Note of Argument of the

learned counsel on the motion to dismiss, that "*the correctness and sufficiency of this proof is nowhere questioned or challenged, nor can it be. It stands as an uncontradicted and uncontested fact in the record, alleged in the Appellant's bill, not denied in the defendant's answer, and fully proved in the evidence, that the net income at Richmond from the intrastate business of the Appellant is not sufficient to pay this tax.*"

By an examination of the answer to the bill on this point, it will be seen that the Appellee admitted that the business carried on by the appellant was a lawful business when carried on subject and in pursuance of the Act of the General Assembly of Virginia and the ordinances of the City of Richmond particularly referred to in the said bill, but denied "that the license complained of in the said bill is unfair, unjust and unequal and in direct violation of law," and on the contrary charged that the Supreme Court of Appeals of Virginia in the case of *Postal Telegraph Cable Co. v. Norfolk*, 101 Va. 125, following the case of *Postal v. Charleston*, 153 U. S. 692, had decided that a municipal corporation with the powers granted it, such as the City of Richmond had, could legally levy the said license tax as it did, for the privilege of doing business within the City of Richmond, but not including any business done to points without the State, and not including any business done for the Government of the United States, its officers and agents, as expressly provided by section 15-a of Chapter 15 of Richmond City Code, 1910, and in the same connection said in said answer that the complainant had paid the said license tax for said period without objection or protest for so long a time as to operate as an estoppel by its act from claiming that such charge was or is illegal, and that said charge was not onerous and oppressive, yet, the learned counsel says that the imposition of said license tax was "unquestioned and unchallenged."

The case of *Osborne v. Florida*, 164 U. S. 650, was a case to which objection was made by an express company engaged in interstate commerce to the imposition of a license tax of \$200 in cities of 15,000 inhabitants or more; in cities of 10,000 to 15,000 inhabitants, \$100; in cities of 5,000 to 10,000, \$75; in cities of 3,000 to 5,000 inhabitants, \$50; in cities of 1,000 to 3,000 inhabitants, \$25; in towns and villages of less than 1,000 and more than 50 inhabitants, \$10, on the same ground here made that it constituted a burden upon interstate commerce.

Mr. Justice Peckham, delivering the opinion of the court, sustaining the constitutionality of the Florida statute, said at page 651:

"The case of *Crutcher v. Kentucky*, 141 U. S. 47, is not in the slightest degree opposed to this view. The act which

was held to be in violation of the Federal Constitution in that case prohibited the agent of a foreign express company from carrying on business *at all* in that State without first obtaining a license from the State."

And again at page 655 says:

"The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the State court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."

The particular cases most relied upon by the learned counsel are *Crutcher v. Kentucky*, 141 U. S. 47, *Pullman Co. v. Adams*, 189 U. S. 420 and *Western Union v. Kansas*, 216 U. S. 1.

In the last mentioned of these cases, it is to be observed that two members of the court delivered opinions confirming the judgment of the court below, while a dissenting opinion was delivered by Mr. Justice Holmes, in which Mr. Chief Justice Fuller, Mr. Justice McKenna and Mr. Justice Peckham concurred, the decision thus being made by five justices with four dissenting. Mr. Justice Harlan, who delivered the principal opinion in the case, elaborately reviewed a number of decisions by the court in seeming conflict with the view taken by the majority of the court. Of the nature of the case Mr. Justice Harlan thought it necessary to observe, *in limine*, "The above extended statement would seem to be justified by the importance of this case."

Subsequently he refers to the case of *Crutcher v. Kentucky*, *supra*, as having an "important bearing on more than one question in the present case." Concluding his discussion concerning that case he quotes approvingly from Mr. Jus.

tice Bradley in that case, where the following language was used: "*But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection*," and in criticism of the Kansas statute held by him to be unconstitutional, he says: "It (the State) has seen proper to exact a specified per cent. of the authorized capital of the telegraph company, representing, necessarily, *all its business, interstate and intrastate, and all its property interests in and out of the State*" (p. 32). Further on in the opinion at page 38, he says: "It is firmly established that, consistently with the due-process clause of the Constitution of the United States, a State cannot tax property located or existing permanently beyond its limits." He approves of the holding in the case of *Osborne v. Florida*, *supra*, thus differentiating that case from the case of *Crutcher v. Kentucky*. Referring to the case of *Pullman Co. v. Adams*, *supra*, he says: "*We perceive nothing in the judgment of that case which conflicts with what is herein said. That case involved the validity of a tax of a certain amount imposed by Mississippi on each sleeping and palace-car company carrying passengers from one point to another within the State, and so many cents per mile for each mile of railroad track over which the company runs its cars in this State*," and concluding on this point, he differentiates the case under consideration from that case because in that case no local business was permitted until the company "shall pay to the State a given per cent. of its entire capitalization, representing the value of all its business, property and interests within and without the State." This at least justified the contention that the imposition of the Kansas statute was a material burden upon interstate commerce. Surely this case (*Western Union v. Kansas*) is so unlike the instant case that it cannot be relied upon as authority to justify the reversal of the decision of the court below.

Mr. Justice Holmes, in his dissenting opinion, however, evidently did not view the Kansas statute in the light in which Mr. Justice Harlan did, and criticized, may we say, in a manner strictly judicial, the holdings made by the majority of the court, saying: "I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision," citing *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, and many other cases, in which dissent, as above stated, Mr. Chief Justice, Mr. Justice McKenna and Mr. Justice Peckham concurred.

Besides, the new distinguished Chief Justice—in a concurring opinion—based his concurrence, it seems to us, mainly upon the

ground that the telegraph company had for many years "constructed its lines, established its offices, etc., and has since been engaged in business—both interstate and local," and, in the same connection, said: "It is not disputed that there was no law in the State forbidding the Company from doing as it did. From this it results that the corporation went into the State, constructed its plant, and carried on its business on the implied invitation, or at least with the tacit consent of the State. No one questions that the tax which is here in dispute, imposed by the laws of Kansas upon the corporation, is repugnant to the Constitution of the United States because wanting in due process and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious there is, of course, no attempt to sustain its validity on its intrinsic merits."

This situation is so unlike the situation here, that comment is unnecessary except to say that the appellant entered the State of Virginia with full knowledge of its regulations and ordinances concerning the occupancy of the highways of the Commonwealth, and the conditions on which such occupancy might take place, and for years paid without objection the rental fee and license tax prescribed by the ordinances of the city as hereinbefore set forth.

A leading case bearing upon this question is *Maine v. Grand Trunk Ry Co.*, 142 U. S. 217. The authority there specially relied upon was *Home Insurance Co. v. New York*, 134 U. S. 594, while Mr. Justice Bradley in his dissenting opinion, relied on *Crutcher v. Kentucky*, *supra*, yet in the case of *Ficklen v. Shelby County Taring District*, 145 U. S. 1, the court approved and followed the case last above cited. Mr. Justice Harlan alone dissenting, again brought forward the case of *Crutcher v. Kentucky*, *supra*, as an authority, but none of the members of the court who concurred with Mr. Justice Bradley in the *Maine v. Grand Trunk Railway Co.* case united with him in his dissenting opinion in the *Shelby County Taring District Case*, involving substantially the same question, which fact to us seems significant, especially in view of the fact that *Maine v. Grand Trunk Railway Co.* has been cited and approved in numerous cases, among the last of these being *St. Louis R. Co. v. Arkansas*, 235 U. S. 364.

The language of Mr. Justice Field in *Home Insurance Co. v. New York*, 134 U. S. 594, 600, repeated by the same learned judge in *Maine v. Grand Trunk Railway Co.*, *supra*, at page 231, is pertinent. It was there said:

"The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No

constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

By stipulation 16, found on page 113 of the Record, it will be seen that the appellant for the year 1915 was charged by the City of Richmond with the following taxes, including pole rental charge:

License tax for intrastate business	\$ 300.00
Property tax	55.03
Charges on poles under ordinance—owned (316) and on poles used (17), total 333.....	666.00
Aggregate	\$1,021.03

This aggregate includes, as will be seen, 316 poles owned by the appellant and 17 poles belonging to other companies on which it was charged a rental of \$2 per pole. Of this 333 poles the chief grievance relied upon to sustain the contention of the appellant in its brief is that the 333 poles was augmented to the extent of 124 poles (Record, 116) by reason of the annexation "of sparsely populated suburban territory" in the year 1914. It seems to us that this alleged grievance is without merit. Whether the territory of the City of Richmond should be enlarged was a purely governmental matter, the determination of which was by the act of the General Assembly, approved March 10, 1904 (Acts 1904, p. 114) left to the courts. This act was called in question in the previous annexation of territory to the City of Richmond and held to be constitutional and valid in the case of *Henrico County v. City of Richmond*, 106 Va. 282, decided December 6, 1906. Harrison, J., delivering the opinion of the court in this case said at page 299-300:

"The policy of annexation is as a public necessity was determined by the Legislature when it enacted this statute providing for its accomplishment when certain conditions were shown to exist. The court is called upon by the statute to express no opinion as to its wisdom as a matter of public policy. It has only to determine upon the evidence adduced, the rights of the opposing parties in the particular case before it; whether, upon the facts and circumstances established by the evidence, the City is entitled to any extension at all, and if any, how much, and the terms and conditions upon which such extension shall be granted."

It seems to us that the *ex cathedra* statement of counsel not only unsupported, but not attempted to be supported, that the court of original jurisdiction to whom was relegated the determination of the necessity and expediency for annexation should be, in effect, overturned upon the mere *ipsi dixit* of counsel attributing to the City of Richmond the purpose of extending "its grasping taxing hands" (Brief of Counsel, p. 27) upon property for the purpose of increasing its revenues. Specially is this true when the revenue from the 124 poles would be only \$218, whereas the aggregate of receipts and cash balances at the beginning of the year 1913 was \$6,031,835.00. (See "Municipal Revenues Expenditures and Public Properties 1913," issued by the Department of Commerce of United States Government, p. 80).

To sustain the contention of the learned counsel, he seeks argumentatively, to compare the City of Richmond with the town of New Hope, Pennsylvania, Taylor, Pennsylvania, and Cordele, Georgia—that is to justify his contention as to the unreasonableness of the ordinances of the City of Richmond. It is proper that the court should have its attention drawn to the disparity existing in many ways between the City of Richmond and the towns above mentioned. In the stipulation of counsel (Record, p. 114), as shown by the United States Census Bulletin, the population of Richmond for the year 1910 was 127,628, whereas for the year 1915 it was 154,674, showing an increase of 23 per cent., and that according to the United States Census for the year 1910, the population of the three towns referred to was as follows: New Hope, 1,080; Taylor, 9,060, and Cordele, 5,883, and allowing the same percentage of increase in these towns as that shown for the City of Richmond for the year 1915, the population of same would be as follows: New Hope, 1,328; Taylor, 11,144 and Cordele, 7,236. In this situation the court is asked, in effect, to say that the expense incident to the right to use the streets of the City of Richmond for the purposes aforesaid, should be governed by cases in which it was determined that the charges were exorbitant, and therefore imposed for revenue in said towns, and out of all proportion to the actual cost of inspection, etc., which they might legally have done. Such a comparison is of course ridiculous and not to be considered.

Continuing the comparison along other lines, it is to be said that only the revenue of two of these towns, viz: Taylor, Pa., and Cordele, Ga., are given in the United States Census report, the other not having a population in excess of 2,500.

Taylor appears for the year 1913 to have had an aggregate of receipts and cash balances of \$229,615, while Cordele is reported as having an aggregate of receipts and cash balances of \$123,461. (See above mentioned publication by Census Bureau, pp. 72 and 47.)

In the same connection it may be said in answer to the contention of the appellant that the City of Richmond had unduly and unnecessarily enlarged its corporate limits in the year 1914, it will appear by reference to the publication entitled, "Financial Statistics of Cities having a Population over 30,000," Bureau of Census, 1917, at page 125, that the City of Richmond had a land area of 11,582 acres, whereas Birmingham, with substantially the same population had a land area of 31,651 acres; Omaha, Nebraska, with a population of 124,096 had a land area of 19,840 acres; Worcester, Mass., with a population of 145,986, had a land area of 24,634 acres, while Memphis, Tenn., with a population of 148,995, had a land area of 12,352 acres.

It is submitted that it cannot be said with any show of reason that Richmond had recklessly, as the argument of the learned counsel indicates, enlarged its territory beyond what other cities having practically the same population had done.

But finally on the point, that the making of a condition precedent in a statute or ordinance imposing a license tax upon a foreign corporation vitiates the entire statute, we refer with the utmost confidence to be case of the *St. Louis Southwestern R. Co. v. Kansas*, 235 U. S. 359. In that case the State of Arkansas passed a statute imposing an annual franchise tax upon a foreign corporation for the privilege of exercising its franchise in that State of a specified percentage of the outstanding capital stock of the corporation represented by property owned and used in business transacted in the State." The objection was made that the statute imposed a substantial burden upon interstate commerce and was, therefore, unconstitutional, but this Honorable Court, speaking through Mr. Justice Pitney, held that the adoption of the statute was within the power of the State, and that making the payment of the tax a condition precedent, being separable from the rest of the statute found to be constitutional that the imposition of the tax would not be declared void on that account, saying that the two provisions were separable and even though the condition precedent itself might be void, yet the statute itself would be declared valid. Concerning the first point made against the statute, it is said, on page 361:

"So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in *Postal Telegraph-Cable Co. v. Adams*, 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: 'It is settled that where by way of duties laid on the transportation the subjects of interstate commerce, or on the receipts derived therefrom, or on

the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

"So, in *Atlantic & P. Telegraph Co. v. Philadelphia*, 190 U. S. 160, the court reviewing numerous previous cases, laid down certain propositions as well established, and among them the following: (a) No State can compel a party, individual or corporation, to pay for the privileges of engaging in interstate commerce; (b) this immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in having a situs within its territory, although it be employed in interstate commerce; and (c) the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, provided, at least, the franchise is not derived from the United States.

"Applying these principles we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the State."

Citing many cases, several of which were against telegraph companies engaged in interstate commerce, who asserted the claim now asserted by the appellant here.

And concerning the last point, it was said, at pages 368-371:

"But the State court has not as yet construed the section as calling for the forfeiture of the privilege of doing interstate business in the event of non-payment of the franchise tax; nor is the State here insisting upon such a construction.

The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its non-payment. *Non constat* but that the State court will hold, *when confronted with the question that the franchise is to be forfeited pursuant to section 20 is confined to intrastate commerce*. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by section 237, Judicial Code (36 Stat. at Large 1156, Chap. 231, Comp. Stat. 1913, sec. 1214), it is proper for this court to wait until the State court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution." (Citing many cases).

"At present, therefore, we have merely to consider whether section 20 so clearly requires a forfeiture of the interstate franchise for non-payment of the tax in question, that it is not reasonable to anticipate that the State court will put another construction upon it. And in doing this we ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon State action by the Federal Constitution, or that the courts of the State will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this: that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts will adopt that which is consistent with the Constitution because it is to be presumed that the Legislature intended to act within the scope of its authority." (Citing cases) * * *

"In view of all these considerations, we ought to assume, until the State, through its judicial or administrative officers, places a different construction upon the act, that section 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else, that the section, being void for unconstitutionality will be treated as severable from the other provisions of the act. Under either view it is obvious, from what has been already said, that the tax does not amount to a regulation of or a burden upon interstate commerce."

See also *Western Union Telegraph Co. v. Missouri, etc.*, 190 U. S. 412, and specially what was said by Mr. Justice McKenna at pp. 421, 425. Also *Adams Express Co. v. Ohio*, 165 U. S. 191, 225.

This case has been cited and approved in the more recent cases, namely, *Cudahy Packing Company v. Minnesota*, 246 U. S. 450, and *United States v. Blue Co. v. Oak Creek*, 247 U. S. , in the last of which cases Mr. Justice Pitney, delivering the opinion of the court, says:

"(b) That the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property subject to State taxation, provided, at least, the franchise be not derived from the United States."

And again in *Cudahy Packing Co. v. Minnesota*, (p. 453) above cited, Mr. Justice Van Devanter says, quoting from *St. Louis etc., Co. v. Arkansas*, 235 U. S. 350, 367:

"By whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack as restraining or burdening such commerce."

Again at page 454, the learned Justice said:

"The question of the nature and effect of taxes more or less like this has been repeatedly considered in this court. In some instances its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled, it has not been easy to apply them to all the varying situations presented. A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to *Meyer v. Wells F. & Co.*, 223 U. S. 298, and *United States v. Minnesota*, 223 U. S. 335, both decided on the same day."

Another case brought forward by the learned counsel is *Postal Telegraph Cable Co. v. Cordele*, 111 Ga. 658, S. C. 82 S. E. 26, stated by him to be "A case in all respects similar to the instant case, in fact identical with it except in figures." (Brief on Motion to Dismiss, p. 8).

As the opinion of the court in that case will show, it is the case principally relied upon in the case of *Postal v. Norfolk*, 118 Va. 455, to support the correctness of the calculation used in that

case. Judge Kelly, in delivering the unanimous opinion of the Supreme Court of Appeals of Virginia, says at page 461:

"The same general method appears to have been employed in the case cited, but it does not appear to have been challenged, and, from all that we can say from the report of the case, there may have been in the evidence sufficient relevant facts to meet the objections discussed above. The trouble here is not merely that a ratio or per cent. has been used, but that the ratio is not shown to be correct. It may have been otherwise in the Georgia Case, but if not, and if the decision there can be considered as authority for the contention of the company in this case, *then we are unable to follow it.*"

It thus appears that said case, so relied upon as aforesaid, has been distinctly rejected, and we submit further that it is not in accord with the principles laid down by this Honorable Court in the cases hereinbefore cited, fixing the method that should be employed to determine the question whether a license tax imposed by a municipality is confiscatory because it constitutes a substantial burden upon interstate commerce. It may be appropriately said in addition on this point, that the Norfolk case hereinbefore last cited and relied on in a large degree, turned upon the mere construction of city ordinances, and insofar as they related to the construction of the same, are of course binding and conclusive upon this Honorable Court.

It is further insisted, *that for the first time the learned counsel, in his brief*, brought forward, as a ground to justify the unconstitutionality of the ordinances in this case, any charge that sub-sections (1), (5) and (6) of section 1294-h of the Code of Virginia, 1904, and sections 153 and 156 of Article XII of the Constitution of Virginia (which sections are quoted on pages 116-122 of the Record), were unconstitutional and void *because as a condition precedent* to the doing of business in the State of Virginia, by the appellant it was required to obtain a license to do business in this State, while section (5) requires telegraph companies doing business in this State to receive and transmit dispatches. (Brief of Appellant on Motion to Dismiss, pp. 7-8).

To sustain this contention, the case of *Osborne v. Florida*, *supra*, (164 U. S. 650) is relied upon. Concerning this contention it is answered:

That in the pleadings in this case, no sufficient issue was raised to justify the consideration of the same by the court below, and, as a matter of fact, it was not considered.

In the bill of complaint, on pages 6 and 7 of the Record, will be found the following:

"Wherefore the complainant company could not afford, under the facts as just hereinabove set out, to continue to do business in the City of Richmond, were it not from the advantage derived therefrom in connection with the business done by it in other and more populous parts of the United States where its patrons demand connection with the important towns and cities of the rest of the country, and complainant necessarily maintains its office in the City of Richmond, not for the financial income it receives from its intrastate business at Richmond, but for the purpose of meeting this demand of its patrons in other cities and States throughout the United States and in connection with the operation of its general interstate telegraphic business; and that in operating this office in the City of Richmond for interstate business it is absolutely necessary that it should likewise receive and transmit all messages offered to it which are intrastate in character and addressed to places at which it has offices in the State of Virginia, for under the law, and by express statute of the State of Virginia, it cannot refuse to accept such intrastate business so long as it keeps the Richmond office open and undertakes to maintain it for the purpose of receiving and transmitting telegraphic messages, and as an office of a public service corporation for the conduct of a general interstate telegraphic business; that the maintenance of its office in the City of Richmond is necessary to meet the demands and requirements of its interstate business, and that it could not abolish or discontinue the said office without destruction of its general scheme and plan of interstate commerce and competition therein, and without serious and irreparable injury to its said interstate commerce business."

With these vague statements in reference to the particular sections of the Code of Virginia, above mentioned, and to the Articles of the Constitution of this State, claimed to be, in part at least, unconstitutional and void, there is no direct reference made to either of the sections of the Code or Constitution referred to above.

In answer to the Sixth Clause of said bill, which contains an attempted demonstration, by figures, that the imposition of the rental and tax fee were confiscatory, and to that end reproduced a statement said to be sustained by the affidavits of its witnesses, Hall and Reynolds.

To this contention, the Answer stated that the exact question

there raised and the alleged state of facts there set forth, were brought to the attention of the Court in the litigation hereinbefore referred to—that is the litigation between the City of Richmond and the Postal Telegraph-Cable Company, theretofore had and referred to in the record of the case which is filed as one of the exhibits with the Answer and marked Exhibit R. No. 6, and then concluded by saying: "But Respondent does not admit the truth of the said alleged facts, and *if the same are to be here litigated calls for proof of the same.*" (Record, p. 17).

It is a principle too familiar to need the citation of authority that when the question of the constitutionality of a State Constitution, or of a State statute, or the ordinance of a municipality is raised, *it must be distinctly set forth and relied on in the pleadings and not left to depend upon construction in order to show that the party complaining has assailed such writing as unconstitutional.* However, see on this point Cooley on Constitutional Limitations, 4th Ed., p. 198, and 2 Ency. P. & Pr., pp. 40-41.

But to show further that the question now sought to be litigated was not rolled upon when considered by the learned Judge of the United States District Court, we refer to the conclusion of the Court found on page 123 of the Record, and also assignments of error, Record, p. 125-6, and the utter absence in the pleadings of any such issue. In *Old Jordan M. & M. Co. v. Societe Anonyme des Mines*, 164 U. S. 260, 264, it was held that: "This court can not be called upon to consider such assignments of error as are pressed upon the attention or noticed in the opinion of the court below."

See also *Wood v. A. Wilbert Sons S. & L. Co.*, 226 U. S. 384; *Matheson v. United States*, 227 U. S. 540, and *Virvée v. Creamery P. Etc., Co.*, 227 U. S. 8, 38.

It is patent, or at least must be presumed, that if the question, now for the first time definitely imported into this record, had been raised in the court below that the counsel for the appellee would have also raised the question that the State of Virginia was a necessary party to a proceeding which called in question the constitutionality, not only of one of its statutes but of the provisions of its Constitution, or if there had been a failure so to do the learned Judge of the Court below would, *ex mero motu*, have ordered that the State of Virginia be brought into the litigation as a necessary defendant. No suggestion of the sort was made and no such action was taken. An illustrative case is *Dallan A. & M. Co. v. Virginia*, 246 U. S. 498.

From the foregoing it necessarily follows that the question now sought, for the first time, to be imported into these proceedings, *is dehors* the record, and therefore cannot be litigated here.

It is, therefore, submitted that the appellant cannot, in this court, complain as to the unconstitutionality of the State Constitution, nor any statute of the State passed in pursuance thereof, or any ordinance of the City of Richmond.

It does not appear in the record, and is not a fact, that any ordinance of the City of Richmond makes, *as a condition precedent to the appellant doing business in the City of Richmond, the payment of the license tax complained of.* The Record will show that on December 18, 1906, the State Corporation Commission, in a proceeding entitled "*Commonwealth of Virginia, at the relation of the State Corporation Commission v. Western Union Telegraph Company and Atlantic Postal Telegraph Company*" (predecessor of the appellant company) entered an order which is in the following language and explains itself:

"In this proceeding, the two defendant companies, Western Union Telegraph Company and Atlantic Postal Telegraph Cable Company, appeared before the Commission on the first day of August, 1906, and filed, respectively, separate written answers. *The said answers having been carefully considered by the Commission, the Commission is of opinion that in fixing and prescribing a rate for transmitting intrastate telegraphic messages, the Commission is in the exercise of proper State authority, and that such exercise of authority is not in conflict with any of the provisions of statutes of the Federal Congress or of the Constitution of the United States, relative to post roads or intrastate commerce, referred to in said answers. The Commission is of the opinion that the rates now fixed and prescribed are just, reasonable and valid, and it is, therefore, ordered as follows:*

"In receiving, transmitting and delivering telegraphic messages in Virginia, the Western Union Telegraph Company and Atlantic Postal Telegraph Cable Company shall observe and conform to the following rates and requirements, now fixed, prescribed and ordered by the Commission, viz:

"Except as may be otherwise specifically provided at any time by the State Corporation Commission, neither of the said two telegraph companies shall collect, for the service over its line between any two points within this State, more than twenty-five cents for transmitting a message of ten words, or less, exclusive of date, address and signature, nor more than two cents for each additional word in a day message, nor more than one cent for each additional word in a night message. Whenever a message is transmitted over the lines of both of said companies in order to reach destination, neither of said

companies shall charge or collect more than forty (40) cents for the service of itself and the connecting telegraph company in transmitting a message of ten words or less, exclusive of date, address and signature, between any two points within this State, nor more than three cents for each additional word.

"Messages shall be received for transmission, and delivered at destination, as now provided by statute, until other provision is made therefor.

"Both of said companies shall forthwith, by proper directions to their officers and agents in accordance with the course of business of each Company, properly provide at once for putting into effect the foregoing rates and requirements, the same to take effect on the first day of January, 1907, after which date any rate or provisions in conflict with the said rates and order now fixed and prescribed by the Commission shall be unlawful and void.

"This order shall not be construed to infringe upon any right of the said companies under the Constitution and laws of the State of Virginia, or the Constitution and laws of the United States." (Record, p. 120-122). See also "Constitutional Provisions, Statutes and Public Regulations Governing Railroads and Other Common Carriers in the State of Virginia," January 1, 1917, p. 156-167.

In this situation it is patent that it was the duty of the appellant, if injustice had been done it by the entry of the said order, to appeal, as it had a right to do, from the said order. It was, and is the proper mode to have litigated, the question that it now attempts to bring to the fore in this case. Said companies took an appeal from said order, and having failed to take an appeal therefrom within twelve months from the entry thereof, the decree is final and conclusive. Appellant proposes now to re-litigate what might have been litigated by an appeal to the Supreme Court of Appeals of Virginia, and from thence to this Court which it had as a matter of right, it being provided in the Constitution of this State that any person aggrieved by a decision of the State Corporation Commission in the exercise of its power of supervision over corporations doing business in the State of Virginia, should have a right of appeal to the Supreme Court of Appeals of Virginia. The provision concerning the right of appeal will be found in Virginia Constitution, 1902, Art. 12, sec. 156, and is in the following language:

"(d) From any action of the commission prescribing rates, charges or classification of traffic, or affecting the train

schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in sub-section e of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, schedule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the Commonwealth. *Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable.* If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for appeals from any other action of the Commission, by the Commonwealth or by any other person interested, irrespective of the amount involved. *All appeals from the Commission shall be to the Supreme Court of Appeals only; and in all appeals to which the Commonwealth is a party, it shall be represented by the Attorney General or his legally appointed representative.* No court of this Commonwealth (except the Supreme Court of Appeals by way of appeals as herein authorized) shall have jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties." (Const. of Va., Code 1904, Vol. 1, p. 254).

In the case of *Western Union v. Kansas*, 216 U. S. 1, cited on page 10 of the Brief of the learned counsel for the appellant on the motion to dismiss, the case of *Postal v. Adams*, 155 U. S. 688, 696, is cited and approved, yet at page 696, it is said by Mr. Chief Justice Fuller:

"The right of a State to tax the franchise or privilege of being a corporation, as personal property, has been repeatedly recognized by this court, and this whether the corporation be domestic or a foreign corporation doing business by its permission within the State. But a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the State may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens."

Therefore, reading this case, in connection with the case relied on (*Western Union v. Kansas*, 216 U. S. 1), as should be done, the case does not conflict with *Osborne v. Florida*, hereinbefore cited, which held that a franchise of a foreign corporation doing intrastate business may be taxed upon its franchise, provided only if the tax is reasonable. Of course it is to be granted that if the license tax so imposed is potently out of proportion to a similar tax imposed upon domestic corporations or is so unreasonable as to justify the conclusion that it was imposed for revenue purposes and not as a just property tax or reasonable imposition for regulation, it can be declared unconstitutional. None of the more recent cases on which the appellant relies, or which have been decided by this Court hold differently.

Concerning the frequently brought forward contention in cases involving the right of the States to impose a license tax for the transaction of business by a foreign corporation, we beg to say that the case of *Marconi Wireless Co. v. Commonwealth*, 218 Mass. 558, decided October 7, 1914, by the Supreme Judicial Court of Massachusetts, is strikingly important. As will be seen by the syllabus it was there held that "The mere fact that a foreign corporation may not be able to make profits enough on its domestic business transacted in this Commonwealth to meet the excise imposed by Statute 1909, * * * does not make the law unconstitutional as to that corporation nor exempt the corporation from the excise." In the unquestionably able opinion of Mr. Chief Justice Rugg, at page 566, it is said:

"5. The petitioners have emphasized somewhat in argument the phrase in 231 U. S. at page 86 to the effect 'that local and domestic business, for the privilege of doing which the

State has imposed a tax, is real and substantial,' and have sought to infer therefrom that a new limitation has been imposed upon the power of the States. This conclusion does not follow. The sentence probably was intended only as a reference to a fact which existed in the cases then before the court, although not one decisive in any respect as to the conclusion reached. But given its full force, it is nothing more than a statement that a shadow cannot be made the basis of an excise tax. But when the local and domestic business exists, then an excise may be levied. *There is nothing to indicate that a comparison between the total business of the company and its local business was intended. Such a basis has never before been intimated.* It is directly contrary to *Ficklen v. Shelby County Taxing District*, 145 U. S. 1. See also *Flint v. Stone Tracy Co.*, 220 U. S. 107. If such a principle exists in reference to any facts, it has no relation to any of the cases at bar. The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does the State can fix its own terms so far as license fee is concerned.

"6. The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation and is in other respects invulnerable, the mere fact, that some foreign corporation may not be able to make profits enough to meet it, does not render the law unconstitutional as to that corporation. The opportunity to do business subject to the protection of our laws, and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise. *United States v. Singer*, 15 Wall. 111. *Flint v. Stone Tract Co.*, 220 U. S. 107, 166, 167.

"Both upon this point and the one last discussed the petitioners rely on the statement in *United States Express Co. v. Minnesota*, 223 U. S. 335, 348, to the effect that if the amount of the tax is "unduly great, having reference to the real value" of the property engaged in the business, and on that in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 42, referring to a tax "not at all disproportioned to such local business." See *S. S. White Dental Mfg. Co. v. Commonwealth*, 212 Mass. 35, 41. These tests well may be used as aids in determining whether the general scheme of an excise statute is an honest attempt to raise legitimate revenue, or whether it is "a mere device to reach and burden the interstate commerce of the company." But when the general scheme of the statute has

been upheld as not out of harmony with the Federal Constitution, then it cannot be stricken down because in a particular instance the excise may seem large. *New York v. Roberts*, 171 U. S. 658, 661, 663. *Pullman Co. v. Kansas*, 216 U. S. 56, 66, 67. *Ohio Tax Cases*, 232 U. S. 576, 592."

And again at page 576, it was said:

"In none of the cases considered under paragraphs 9 to 12, both inclusive, of this opinion is the intrastate business more intimately connected with interstate commerce than in *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171; *Pullman Co. v. Adams*, 189 U. S. 420; *Osborne v. Florida*, 164 U. S. 650; *Pennsylvania Railroad v. Knight*, 192 U. S. 21; *Browning v. Waycross*, 233 U. S. 16, in each of which it was held that the two were separable for purposes of a State excise on the domestic business."

In *Dalton A. M. Co. v. Commonwealth*, 118 Va. 557, 574, it will be seen that the Supreme Court of Appeals of Virginia gives its unqualified approval of the holdings in the Massachusetts case, affirmed by this Honorable Court in 246 U. S. 498. Other cases bearing upon this point are *Kehr v. Stewart*, 197 U. S. 60, 68; *Armour Packing Co. v. Lacy, Treas.*, 200 U. S. 226, and *Dalton Adding Machine Co. v. Commonwealth of Virginia, at the relation of the State Corporation Commission*, 236 U. S. 699.

It is, therefore, insisted that the apparent disproportion between the revenues derived from intrastate business and interstate business is not a concluding factor in determining whether a State has a right to impose a license for intrastate business.

FOURTH.

That the constitutionality and legality of the charge of two dollars per pole for every pole used or maintained by a telegraph company in the City of Richmond, and of the right to impose a license tax of \$300 for maintaining an office in the City of Richmond, are each alike matters *stare decisis*.

The doctrine invoked under this head is embodied in the maxim *stare decisis et non quicta movere*.

Of this doctrine it is said:

"The principle embodied in the maxim has been for centuries recognized and acted upon in English law. As early as A. D. 1154 there was a judicial declaration as to the necessity of respecting the authority of decided cases. The doctrine of *stare decisis* owes its origin and observance to the recognition of the necessity for stability and uniformity in the construction and interpretation of the law. It is too evident to require discussion that the interests of the State and of the individual and the proper administration of justice require that there should be settled rules in these matters. The application of the doctrine necessarily cannot be according to fixed rules, but must be determined in each case by the discretion of the court. It has been stated that decided cases bear the same relation to the science of the law that a convincing series of experiments bear to any other branch of inductive philosophy. They are, on being promulgated, immediately relied upon according to their character, either as confirming an old or forming a new principle of action. They are continually multiplying throughout the whole extent of the court's jurisdiction and form the basis of a claim to numerous and valuable rights, offensive and defensive. The doctrine, as its name shows, has only to do with direct and controlling decisions, especially precedents for future cases, involving the same or similar issues. Its application is in no way affected by dicta." (26 Am. & Eng. Ency. L., p. 160-1.)

In the case of *Western U. T. Co. v. Goddin*, 94 Va. 513, 515, it was said:

"At the time the writ of error in the case before us was awarded, the constitutionality of Section 1292 had been twice passed upon in this court, and it was no longer a debatable question. The test of good faith does not fully meet the difficulty. Counsel and parties may, with perfect good faith, ask the reiterated judgment of this court upon any question, and we do not clearly perceive how this court could say at just what point the appeal to it was wanting in good faith. A better test, perhaps, is to be found in considering whether or not the point presented is any longer open for argument. Is it a debatable question? See 2 Ency. of Plead. & Pr., p. 40-41; *Virden v. Allen*, 107 Ill. 505; *Chaplin v. Highway Commissioners*, 126 Ill. 264. Applying this test, it is plain that the constitutionality of Section 1292 is not an open one in this court. It is no longer 'debatable'."

In the case of *Postal v. F. & P. R. R. Co.*, 96 Va. 661, 662, Keith, President, delivering a unanimous opinion of the court, said:

"The rule of *stare decisis* is entitled to the greatest respect, and under our system of jurisprudence is an essential feature of the administration of justice. Where a decision, and especially a line of decisions, has been acquiesced in, where it has been followed in other cases and has become a rule of property, and men have, in the conduct of affairs, learned to respect and conform to it, it becomes of especial, and indeed of binding force, and should not be disturbed, except by the interposition of legislative power. But we do not consider that the circumstances adverted to as lending force to a judicial interpretation of a statute, and which may be of so strenuous a nature as to preclude further inquiry into the correctness of the adjudication, apply to the case before us. We have here a single judgment followed in no other case, rendered by a bare majority of the court—two of the judges dissenting—and placing a construction upon the statute law involved in it, which, we think, palpably erroneous and contrary to public policy, as tending to foster and promote a monopoly."

In *Wright v. Sills*, 2 Black 544, 545, it was said:

"Whatever difference of opinion may have existed in this court heretofore in regard to these questions, or may now exist, if they were opened for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhaustive in the earlier cases. It can subserve no useful purpose again to examine the subject. The decree of the court below is affirmed." See also *Western U. Tele. Co. v. Reynolds*, 100 Va. 459, 467.

And, again in *Minnesota, etc., Co. v. National, etc., Co.*, 3 Wall. 332, 334, it was said by Mr. Justice Grier:

"Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgments."

By reference to the opinion of Goff, J., in *Western Union Telegraph Company v. City of Richmond*, 178 Fed. 310, it will be seen that the Western Union Telegraph Company in that case charged in its bill "that said ordinance (the ordinance in question in the instant case), each and every section thereof, and all amendments thereto, are unreasonable, unjust, illegal and void," and elaborating said allegations alleges specifically that the license fee of \$500 and the imposition by Section 10 of said ordinance of a rental charge of \$2 per pole, for every pole owned, used or maintained by it are enormously more than could be legally imposed under any right held by the defendant to make charges for local purposes, etc., and is a gross violation of its rights and privileges and an unreasonable burden upon foreign and interstate commerce. The prayer of the bill being that the City of Richmond be restrained from enforcing the provisions of any of the sections of the Chapter of the City Code complained of. It thus appears that the bill in that case and this case are substantially the same. The learned Judge, Goff, in the Circuit Court in dismissing the complainant's bill, said:

"That complaint was not given permission by the Congress, to occupy the streets of the City of Richmond, *without paying its fair proportion of the taxes required to maintain the government of that city*, and without being required to submit to all reasonable regulations provided for by its Council, has been so often announced by the courts, as to justify the suggestion that questions relating to such matters might well be considered as disposed of. However, in deference to the earnest insistence of able and experienced counsel I refer to a few of the decisions of the Supreme Court of the United States. In *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 100, that court said: 'It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights.'

The learned Judge continuing cites and quotes striking passages from *Atlantic Tel., etc., Co. v. Philadelphia*, 190 U. S. 160, *Richmond v. Southern Bell, etc., Co.*, 174 U. S. 761, and *Western Union Tele. Co. v. Massachusetts*, 125 U. S. 530.

And at page 324, in concluding his able opinion, the learned Judge (Goff) says:

"While it is true that the City cannot impose a tax upon the franchises of the company, as that would be a burden upon interstate commerce, *still it can make a reasonable charge for the use of its property, in which all the public are interested; and if the complainant occupies any of such property there is no reason why it should not pay a reasonable rent for it*, as all citizens and all other corporations do for a like use. It is not a tax in the sense in which that word is ordinarily used, but is in the nature of a special toll, imposed for a specific use of designated property by a particular party. The poles deprive the city and the public of the use of certain portions of the streets, and frequently necessitate the excavation, repair and inspection of the same, causing expense to the city and inconvenience to the public. A toll of two dollars per pole per annum might be an unreasonable charge along a country highway, but in a thickly settled section, like the streets of the City of Richmond, where many people for various purposes make continuous use of them, the sum of two dollars per year for such use per pole seems entirely proper and reasonable. * * *

"My conclusion is that complainant has not been deprived of any of the rights to which it is entitled under the laws and Constitution of the United States, and that no unreasonable rules and regulations have been provided by the ordinance complained of, or by any of its sections, for conducting the business of the complainant in the City of Richmond."

What was said by Mr. Justice Holmes in affirming the holding of Judge Goff in this case (*Western Union Telegraph Co. v. City of Richmond*, 224 U. S. 171-2) concerning the validity of Sections 10 (Record, 25) and 32 (Record, 32) of the ordinance of the City of Richmond is not only pertinent, but conclusive, if the doctrine of *stare decisis* is to prevail. He there says:

"The money charges of \$2 per pole and the same sum per mile of underground wire are found fault with. Many of the cases relied upon by the appellant are cases turning on the limitations to the powers of the municipality. But, as we have said, this bill is brought on the theory that any such legislation by the State would be bad under the Constitution and Act of Congress—not upon the suggestion that the City of Richmond is acting *ultra vires*. If the City could be authorized to do what it has done, we must assume that it is acting within its powers. Taking up the question so limited, we agree with the court below that after the appellant, as is

found, has paid the charges without complaint, for many years, it would require something more than a protest now to induce us to find it unreasonable. The sum is not so great as has been charged and sustained heretofore. *St. Louis v. Western Union Tele. Co.*, 148 U. S. 92; *Postal Tele.-Cable Co. v. Baltimore*, 156 U. S. 210, and *Memphis v. Postal Tele.-Cable Co.*, 164 Fed. 600."

This Honorable Court cannot be unacquainted with the persistency of the appellant in urging in this tribunal, as well as in inferior tribunals, in many States of the Union, the claim that similar charges to those made by the ordinances of the City of Richmond, some larger in amount and some smaller, are unreasonable and therefore illegal and unconstitutional, as interfering with interstate commerce. Among these the *Postal Telegraph-Cable Co. v. Baltimore*, 79 Md. 502, is notable. There the charge was \$5 per pole for the use of the streets of the City of Baltimore. Dissatisfied with the judgment of the Supreme Court of Maryland, the case was appealed to this Honorable Court and is reported in 156 U. S. 210, where the late distinguished Chief Justice, on a motion to dismiss or affirm, made short work of the determination of the question, his opinion consisting of but one sentence, as follows: "The judgment is affirmed upon the authority of *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92."

It thus appears that as far back as 1895, when the foregoing decision was made, this Honorable Court had reached a point where it was thought that the questions presented by that record, which are practically the same as those now presented, "should be considered as settled."

In the recent case of *Western Union Telegraph Company v. Louisville and Nashville R. R. Co.*, 244 U. S. 648, a petition for writ of *certiorari* was denied, the court citing, among other cases, the *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160.

In the answer of the City of Richmond to the bill of complaint in this case, it was said:

"And Respondent further answering says that all of the points in issue in these proceedings were adjudicated and finally passed upon and determined by litigation between the Western Union Telegraph Company, a corporation engaged in the City of Richmond in precisely the same business as complainant, and the City of Richmond, in the case of *Western Union Telegraph Company v. City of Richmond*, decided by the Supreme Court of the United States on April 1, 1912, and reported in 224 U. S. 160, and Respondent further invokes

the doctrine of *stare decisis* as one of its defenses in this case." (Record, pp. 16-17).

But we find in the brief of opposing counsel on the motion to dismiss, under the head of *stare decisis*, the following language bearing upon this point:

"An inspection will disclose that the question presented for decision in that case is not the question presented here. In that case the ordinance regulating the occupancy of the streets by the Telegraph Company and requiring that the location, size, shape and sub-division of the conduits, the material and manner of construction, must be satisfactory to the City Engineer, was thought by the Telegraph Company to be an unreasonable interference with its rights to use the streets under the Post Roads Act. That case presented that single question for decision and the point, and the only point, decided was that the Post Roads Act gave the Telegraph Company a permissive right, only, to use the streets, which right was not violated by reasonable regulations by the City, and that where the City had such right in the street as to authorize a rental charge, a charge of \$2.00 per pole would not be held unreasonable in the absence of proof to the contrary.

"The question as to the authority of the city to charge a rental for the use and occupancy of its streets,—that is whether such act was *ultra vires*,—and the question of reasonableness of such a charge, were not presented to the court in that case. They are among the questions presented here." (Brief on Motion to Dismiss, p. 25).

We hope that we will be excused from expressing our surprise at this statement, and regret that the necessity requires that it should be pointed out as being utterly incorrect.

Turning to the original bill of complaint in the case of *Western Union Telegraph Company v. City of Richmond*, we find at page 12 of said bill that the license tax of \$500 per annum is alleged to be unreasonable and illegal and null and void, and that likewise in section 10 of said bill it is definitely charged that the fee of two dollars per pole for each and every telegraph pole, used, possessed or maintained by the Western Union Telegraph Company in the streets of the City of Richmond was an unreasonable, unwarranted and illegal burden upon interstate commerce, and also enormously more than could be properly or legally charged as a rental for the space occupied by said poles and wires, etc., and that, in addition, each user of the same pole is required to pay a sepa-

rate tax of two dollars per annum on each pole so used. (Record in *Western Union v. Richmond*, p. 15).

And by Article 16 of the Amended Bill, filed in the case it is provided as follows:

"Your orator avers that Sections 9, 10, 11, 12 and 13 of said Chapter 88 violate your orator's rights under the said Act of Congress in that in and by said sections provision is made by the said city for the imposition upon your orator of a charge of two dollars for each and every telegraph pole used or maintained by it in the streets or alleys of the City of Richmond, and also for the collection of the said fee of two dollars per annum for the maintenance of said poles and the prohibition of the maintenance of any poles except upon the payment of the said two dollars per annum per pole, which said sum of two dollars is excessive and beyond any legal charge that the city is entitled to impose upon your orator under the provisions of the Constitution of the United States and the Acts of Congress hereinbefore set forth. Your orator avers that the said sum of two dollars per pole per annum is enormously more than could be properly or legally charged as a rental for the space occupied by said poles, and far in excess of any expense said City of Richmond can properly incur in inspecting or supervising the poles, wires, or other appliances of your orator and that the said sum is enormously in excess of any amount that could be incident to the most careful, thorough and efficient inspection of your orator's lines, wires, poles, cables and other appliances, together with the cost of all measures of reasonable precaution which can be required to be taken for the safety of the said City of Richmond and the public generally and far in excess of any sum expended by the said city for any and all of the above named purposes.

"That your orator pays to the said City of Richmond the same *ad valorem* and property tax for lines, poles, wires, cables, appliances, and property in said city which is imposed upon and paid by other corporations and citizens, and that in addition thereto your orator pays to the said City of Richmond the large sum of five hundred dollars per annum as a specific license tax, the said *ad valorem* and the said specific license tax, paid thus by your orator to the said City of Richmond being the largest sum which could be properly and legally imposed upon your orator for all purposes, and your orator therefore avers that the said fee of two dollars for each and every telegraph pole imposed under the provisions

of said Chapter 88 and specially provided for in sections 9, 10, 11, 12 and 13 of said chapter, are wholly illegal and void and beyond the powers of the said City of Richmond to impose. Furthermore, in and by said section 12 said city requires your orator to remove forthwith from the streets of said city every pole upon which it has not paid the said exaction of two dollars, and by Section 13 of said Chapter 88, for failure to file with the City Engineer a list of the poles and paying said fee of two dollars your orator is exposed to a fine of not less than five nor more than one hundred dollars for each pole, and each day of default in complying with the provisions of the previous sections is made a separate offense, and such fines are to be imposed by the police justice of said City of Richmond." (*Record, Western Union v. Richmond*, pp. 90-91).

The answer of the City of Richmond, by Clause 12, at page 137 of the Record, expressly denies that sections 9, 10, 11, 12 and 13 of Chapter 88 abridge the complainant's right under the Act of Congress as alleged in said amended bill, and, on the contrary, alleged that the imposition of the two dollar rental fee referred to was constitutional, legal and reasonable, and in the same connection stated that the said company was estopped from objecting to the said sections by reason of its long acquiescence therein. And again in Clause 20 at page 143 re-iterated said denial above mentioned.

It thus appears that issues were expressly made upon the legality and constitutionality of the said charges, and by an examination of the assignments of error it will be seen that the following assignment was made:

"Eleventh: That said decree (the decree dismissing the bill of complaint) is erroneous in that it holds that section 10 of said Chapter 88 of the ordinances of the City of Richmond is a reasonable requirement and not repugnant to the Act of Congress of July 21, 1866, and the constitutional provisions set forth in said bill."

Section 10 referred to is the section by which the rental fee of \$2 per pole was required (*Record*, p. 25).

It necessarily follows from the foregoing that the same questions involved in the determination of that case are attempted to be put in issue again in this case.

Undoubtedly Mr. Justice Holmes, in delivering the opinion of the court, took the view that the question of the validity of the imposition of the two dollar rental fee and of the license tax

as well, were issues in the case which the court below had definitely passed upon, and addressing himself to the assignments of error, said at page 171:

"The money charges of \$2 per pole and the same sum per mile of underground wire are found fault with. Sections 10, 32. * * * It would require something more than a mere protest now to induce us to find it unreasonable. The sum is not so great as has been charged and sustained heretofore." Citing numerous cases.

Concluding an unanimous opinion the decree dismissing the bill was affirmed.

In two very recent cases the doctrine of *stare decisis* under substantially the same circumstances as exist here, was sustained.

In *City of Mitchell v. Dakota Central Telephone Co.*, 246 U. S. 396, Mr. Justice McKenna, delivering the opinion of the court and speaking of the reliance of the defense upon the doctrine of *stare decisis*, said at page 411:

"Besides, the decision of the Supreme Court is a factor of controlling strength. It explicitly decided that Ordinance 135 and 180 had distinct purpose and operation, and that the latter did not repeal or supersede the former. The issue was tendered by the company, and the decision upon it is conclusive against the company."

In the case of *Postal v. Newport*, 247 U. S. , where the same question arose, the court, understanding that the case of *Western Union v. Richmond*, *supra*, was followed and controlled the decision, said at page :

"We assume that if the first New York Company did at the outset accept the ordinance, either in writing, according to its terms, or by erecting poles and wires and occupying the streets thereunder, or in any other manner satisfactory to the city, that company and its successors in the ownership of the telegraph system, including defendant, were bound to comply with the terms of the ordinance as to the 'special tax' (which evidently in that case would be regarded as an agreed rental), so long as they continued to retain and enjoy the privileges conferred; that in that event every claim of Federal right here asserted would be without foundation; and that, if the fact of acceptance had been conclusively adjudged in a former proceeding against defendant or its privy, the same result would follow."

This doctrine will be more readily applied in cases where the facts necessary to sustain it are accompanied by long acquiescence which in itself, in some cases, precludes litigation.

See *Essex v. New England Telephone Co.*, 239 U. S. 313, where the case of *Western Union v. Richmond* is referred to and followed.

It took a long time and many decisions, not only of the appellate courts of the several States of this Union, but also of this Honorable Court and other courts as well, holding that a license tax and a reasonably graduated pole tax might be levied upon the poles and wires of telegraph companies, but it is to be hoped that the decisions have at last placed the determination of these questions beyond further investigation.

What Mr. Justice Holmes said on the motion to dismiss the writ of error, which was sustained, in the case of *L. & N. R. R. Co. v. Western Union*, 237 U. S. 300, 302, is apposite. He said:

"The jurisdiction to be exercised was to expropriate by judgment. *But it was well known to the telegraph company from a series of decisions to which it was party that the act of 1866 was merely permissive, and gave no power to exercise eminent domain. The latest decision, repeating many earlier ones, was rendered a month and a half before this amendment was filed.*" (Citing *Western Union v. Richmond*, 224 U. S. 160).

What was said by Mr. Justice Brewer, concurring in an opinion of the court in *Western Union Telegraph Company v. Pennsylvania R. R. Co.*, 195 U. S. 540, 593, also seems pertinent. He said:

"I concur in the judgments in these cases, but do so distinctly on the ground that the questions have been settled in prior cases. If the matter was *res integra*, the views expressed by Mr. Justice Harlan would be very persuasive. *Pensacola Tele. Co. v. Western Union Tele. Co.*, 96 U. S. 1, and *Western Union Tele. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, seem to me controlling. In the first of these cases the scope of the power and authority granted by the act of 1866 was distinctly presented. It was within the proper limits of inquiry, and the opinion of the court shows that it was fully considered. The declarations in that opinion are clear and precise, and cannot be considered in any sense *obiter dicta*. The decision was announced in 1877, and was re-affirmed in 1890 in the Ann Arbor case. If the court erred in its construction of the act, Congress has had twenty-seven years in which to correct the mistake. Its omission to take any action must be

considered as an *acquiescence* on its part in that construction. And I am of the opinion that when this court has construed a statute of Congress, and that construction has remained for more than a quarter of a century, neither changed by any judicial decisions nor set aside by any congressional legislation, it ought not to be disturbed except for the most cogent reasons."

In the brief of counsel for appellant, on the motion to dismiss, at pages 27 and 28, will be found an argument against the system of taxation by way of pole taxes and license taxes in vogue in the State of Virginia, and as claimed, though there is no evidence to sustain the claim, "only in the Southern States," in connection with which, in order, no doubt, to impress the court, he says that the "tendency now is to adopt it in other States."

It is only sufficient to say that the *modus operandi* adopted, by which a sovereign imposes taxes is a matter of policy and a governmental matter as well, and must necessarily be relegated to the discretion of the sovereign, and if this system is arbitrary and unreasonable, the courts are bound to correct injustice or abuse of power, but *prima facie* they are valid and constitutional and the courts will act cautiously in such matters. But it is to be remembered that the courts, with one voice, have said as was said by Keith, P., in the case of *Postal v. Norfolk*, 101 Va. 125, 134, quoted above, that if "the taxes imposed in various forms are onerous and oppressive, but the law operates upon all alike, and are not repugnant to the Constitution of the United States or of the State of Virginia, there is no ground upon which we can hold it to be invalid. If it be a grievance, it is one which cannot be redressed by an appeal to the courts, but to the sense of fairness and justice of the law-making power." See also *Diamond State Iron Co. v. Rurig & Co.*, 93 Va. 595, 603.

For the foregoing reasons and on the authorities cited it is insisted that the questions presented by the record are *stare decisis*, and therefore the appeal should be dismissed, or the decree below affirmed.

FIFTH.

The judgment of the Hustings Court of the City of Richmond (a court of record having jurisdiction of the issues involved in this case), pronounced on October 22, 1913, in proceedings between the appellant and the appellee in this case, remained in full force and effect when these proceedings were instituted, and therefore this proceeding is a matter *res adjudicata* and bars the complainant from further litigation on said issues.

The doctrine invoked under this head has never, perhaps, been more clearly or briefly stated than in *Duchess of Kingston's Case*, 2 Smith's Leading Cases, (6th Ed) p. 468. It was there said:

"From the variety of cases in respect to judgments being given in evidence," said the chief justice, "these two distinctions seem to follow as being generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties on the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question, in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

This language is quoted and approved by this Honorable Court in *Caujolle v. Ferric*, 13 Wall 465, which last mentioned case has been frequently referred to and approved in subsequent decisions.

Among these is the case of *Veitch v. Rice*, 131 U. S. 293, 314, where Mr. Justice Fuller, delivering the opinion of the court, said:

"The courts of Ordinary in Georgia are courts of original, exclusive and general jurisdiction over decedents' estates and the subject matter of these orders, and its judgments, are no more open to collateral attack than the judgments, decrees or orders of any other court. *Dacie v. McDaniel*, 47 Georgia, 195; *Barues v. Underwood*, 54 Georgia 87; *Patter-*

son v. Lemon, 50 Georgia 231, 236; and *Caujolle v. Ferrie*, 13 Wall 465.

"In *Jacobs v. Pou*, 18 Georgia, 346, it was held that 'the judgment of dismissal, by the Court of Ordinary, in such cases, must operate as a discharge from all liability on the part of the administrator, unless the same be impeached in that court, for irregularity, or in the Superior Court for fraud'; and in *Bryan v. Walton*, 14 Georgia 185, that the order appointing an administrator, and in *Davie v. McDaniel*, 47 Georgia 195, and *McDade v. Burch*, 7 Georgia 558, that an order for sale of lands, could not be collaterally attacked."

In the case of *Baker v. Cummings*, 181 U. S. 117, it was held:

"A general dismissal on the merits, of a bill in equity, not made conditionally or without prejudice or with any saving of the right of action, will constitute a bar to the use of the cause of action there involved as a set off in a subsequent action at law between the same parties."

In the case of *Burrell v. Burgess, Collector*, 73 Va. (32 Grat.) 472, 477, it was said by Anderson, J., delivering the opinion of the court:

"The precise question involved in this case was decided by the Supreme Court of the United States since the institution of this suit, in *Pace v. Burgess, Collector*, 92 U. S. 372, which affirms the constitutionality of the Act of Congress—holding that the collection of 25 cents on each package of tobacco for exportation, from the exporter, is not a tax on the exportation of the article. In the case *Pace* was required to pay for the stamps affixed to the packages of tobacco he exported the sum of \$5,090. The question raised in this case is a *res adjudicata*, and is no longer an open question, so far as that tribunal is invested with power to determine it."

In *Kessler v. Eldred*, 206 U. S. 285, it was held:

"If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it."

See also *So. Pac. R. Co. v. U. S.*, 168 U. S. 1, 48, 49 and *Idem* 183 U. S. 519, 528.

In the light of these familiar principles concerning the application of the doctrine of *res adjudicata* and other authorities too numerous to be mentioned, it appears that the telegraph company, by its own voluntary act, as hereinbefore set forth, abandoned its appeal to the Supreme Court of Appeals of Virginia from the said judgment of the Hustings Court of the City of Richmond, thus leaving in full force and effect that judgment.

It goes without saying that instead of dismissing, as it did, its appeal in the Supreme Court of Appeals of Virginia, the complainant company might have there had a hearing, and if the decision had been adverse might have appealed, as a matter of right (a constitutional question being involved), to this Honorable Court. But it did not do so, and, as a consequence, the judgment of the Hustings Court of the City of Richmond was final and conclusive in the matters here adjudicated, and on every other matter which might have been adjudicated on the pleadings.

If it be insisted that the exact issues in the case finally determined by the Hustings Court of the City of Richmond were not identical (found on pages 36-7 of the Record), it is to be answered that the authorities hold that the doctrine now invoked applies to every issue which the parties might have brought forward at the time. See *Beloit v. Morgan*, 7 Wall. 619; *Gould v. Evansville, etc., R. Co.*, 91 U. S. 526; *U. S. v. Dalcour*, 203 U. S. 408, 429.

In the case of *Postal Telegraph-Cable Company v. City of Charleston*, 153 U. S. 692, the Supreme Court held that a license tax of \$500 upon a telegraph company which had accepted the provisions of the Act of July 24, 1866, upon business done exclusively within the city and not including any business done or from points without the State and not including any business done for the Government of the United States, is an exercise of the police power, and is not an interference with interstate commerce.

In *Postal Telegraph-Cable Company v. City of Norfolk*, 101 Va. 125, it was insisted by this complainant that the ordinance of the City of Norfolk which imposed a license tax of \$250, and in addition one dollar per pole for each pole and one dollar on every hundred feet of conduits in the streets of the City of Norfolk owned or used by any person, firm or corporation was for the same reason alleged here and alleged in the Charleston case invalid and unconstitutional and in restraint of interstate commerce, but the court citing the Charleston case held the ordinance of the City of Norfolk to be valid and constitutional.

The complainant here, not satisfied with its contention being in effect overruled by the Supreme Court of the United States in the Charleston case (153 U. S. 692) and by the Supreme Court of Appeals of Virginia (101 Va. 125), brought again the same ques-

tion to the fore in the year 1915, by refusing again to comply with an ordinance of the City of Norfolk imposing a license tax of \$500 for doing *intrastate* business, and although losing its contention in the Circuit Court of the City of Norfolk took the question again to the Supreme Court of Appeals of Virginia, where the court again repudiated the contention of the complainant. (*Postal Telegraph-Cable Co. v. Norfolk*, 118 Va. 455.)

In closing the opinion in the first Postal case (*Postal Telegraph-Cable Co. v. Norfolk*, 101 Va. 125), at page 134 the court uses the following language:

"That case seems to dispose of the one under consideration. When we consider the amount of business transacted by the Postal Company within the City of Norfolk, and within the State of Virginia, it may be conceded that the taxes imposed upon it in various forms are onerous and oppressive, but the law operates upon all alike, is not repugnant to the Constitution of the United States or of the State of Virginia, and there is no ground upon which we can hold it to be invalid. *If it be a grievance, it is one which cannot be redressed by an appeal to the courts, but to the sense of fairness and justice of the law-making power.*"

In the last mentioned case the complainant sought to strengthen the contention made in the First, that the imposition of a rental charge would be confiscatory and therefore illegal and unconstitutional, but its contention on this point, as well as the other contentions made, were again overruled, the court speaking through Kelly, J., saying:

"The company having assailed the constitutionality of the ordinance, was bound to maintain its case, not by arbitrary formulas and artificial rules, but by evidence upon which the court could base an intelligent and reasonable judgment."

If possible the evidence to sustain the contention in the case under judgment, found on pages 102-110, consisting of an affidavit of R. J. Hall and Edward Reynolds, agreed to be read as if in the form of a duly taken and certified deposition, when read in connection with the evidence which was before the court in the former case between the complainant and the City of Richmond, found on pages 64-98, inclusive, and the agreed facts also found in the evidence, is far less conclusive of the contention of the company, than evidence which was rejected as insufficient in two Norfolk cases, and therefore to no appreciable extent does it alter the

situation so as to justify a reversal of the holdings of the court in the Norfolk cases.

In *Christianson v. King County*, 239 U. S. 356, 373, this Honorable Court, speaking through Mr. Justice Hughes, said:

"It was competent for the court to inquire whether there were heirs, and, if there were such, to determine who were entitled to take according to the order prescribed by the statute, and also, if it was found that there were no heirs, to make the distribution to the county, as the statute required. It is apparent that there was no deprivation of property without due process of law. *The court, after appropriate notice, did determine that there were no heirs, and its decree, being the act of a court of competent jurisdiction under a valid statute, bound all the world, including the plaintiff in error. It cannot be regarded as open to attack in this action.*" Citing many cases, among them *Canjolle v. Ferric*, 13 Wall. 465.

Without the least explanation or excuse for not having introduced in the two Norfolk cases, the character of evidence which the learned counsel says he should have introduced, he now introduces that evidence in this case, and seeks to avoid the force and effect of the doctrine of *res adjudicata*. As hereinbefore pointed out, every issue made in the case of *Postal, etc. Co. v. Richmond*, determined in the Hustings Court of the City of Richmond, on October 22, 1913 (Record, p. 51) was renewed and made in this case. In the order of the court determining those issues it is recited as follows: "The court having fully heard and maturely considered the evidence and arguments of counsel, *is of opinion and doth decide that the said Postal Telegraph-Cable Company is guilty of the violation of the City ordinance as charged, and doth impose upon it, the said defendant, a fine of Fifteen dollars. Whereupon it is considered by the court that the City of Richmond recover against the said defendant a fine of Fifteen dollars, together with its costs by it in this behalf expended.*"

Referring to the warrant of complaint on which the Police Justice tried the case, it will be seen that said warrant required that the defendant Company should show cause, if any it could, why a fine of not less than five nor more than one hundred dollars should not be imposed on it for a violation of an ordinance of said City, in this, to-wit, that it failed to pay the fee required by Chapter 40, Section 10, Richmond City Code, 1910, on two certain poles used by it in the streets of the City of Richmond between the first and fifteenth of January, 1913, as required, etc., ((Record, p. 48-9),

and by reference to the assignments of error to the said judgment, it was agreed that under the plea of "Not guilty" *that the defendant company might and did defend upon the ground that the aforesaid section of the said ordinance is unlawful and void, and if not then so much thereof is unlawful and void as imposes a fee of two dollars per pole upon poles used but not owned by the using company, for the following reasons:*

"1st. Because the said ordinance deprives the said company of its property *without due process of law* and is, therefore, in violation of Section 1 of Article 14 of the Constitution of the United States.

"2nd. Because it denies the said Company *the equal protection of the laws in violation of* Section 1 of Article 14 of the Constitution of the United States.

"3rd. *Because it violates the rights and privileges secured to said Company, by the Act of Congress approved July 24th, 1866, entitled, "An Act to aid in the construction of telegraph lines and to secure the Government the use of the same for postal, military and other purposes" and the acts of Congress amendatory thereof.*

"4th. *Because it interferes with and is a burden upon the occupation of said Company as an agency of the United States Government in transmitting messages for said Government under the aforesaid act and under an Act of Congress, approved June 10, 1872, entitled, "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1873, and for other purposes."*

"5th. *Because it imposes an unlawful burden upon and interferes with the interstate commerce in which said Company is engaged, and is in violation of Section 8 of Article 1 of the Constitution of the United States.*

"6th. *Because it is laid for revenue purposes, and not as a reasonable charge for inspection.*

"7th. *Because, if laid as a charge for inspection it is unreasonable and excessive.*" (Record, p. 50).

In the brief of counsel for appellant under the head of "*Res Adjudicata*," on page 29, seeking to avoid the effect of the doctrine invoked on appeal, it is said:

"But it, in no sense, precluded the City from proceeding by similar warrant to enforce compliance in any succeeding year, nor, the defendant from making defense in any such subsequent proceeding. The collection of taxes for the year 1915

and the attempt to impose a fine for default of that year is entirely a separate and distinct cause of action." Citing to sustain his contention *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301; *Wright v. Central R. R. Co.*, 216 U. S. 420; *Cook on Corporations* (7th Ed.) p. 4008, note 4, and 23 Cyc. 1290.

Mr. Cooley in his work on Taxation, discussing this particular question, says:

"Upon the question whether a judgment establishing a liability to pay taxes for certain years is, in a subsequent action between the same parties, *res adjudicata* as to the liability for taxes of a succeeding year when the facts affecting the liability are the same in the two cases, the authorities do not agree. It is held in Iowa, Kentucky, Michigan, Mississippi and Tennessee, that the judgment for a tax is conclusive as to the tax merely, and in suits for taxes of other years is important only as a precedent. Recent decisions of the Federal Supreme Court maintain the contrary doctrine, but have not met the approval of the State tribunals. Of course an adjudication as to the validity of taxes binds the parties thereto in later suits involving the same taxes." (2 Cooley on Taxation, (3rd Ed.) p. 846-7).

To sustain his statement, Judge Cooley cites the cases of *New Orleans v. Citizens Bank*, 167 U. S. 371, and *Baldwin v. Maryland*, 179 U. S. 220.

The doctrine in this particular class of cases is distinctly recognized by the late distinguished Mr. Justice Lurton, delivering the opinion of the court, in *U. & P. Bank of Memphis v. Memphis*, 111 Fed. 561, 568, where he said:

"Under the decisions of the Supreme Court of the United States the mere fact that the present demand is for a tax for one year and the demand in the adjudged case was for taxes for other and antecedent years, 'does not prevent the operation of the thing adjudged'," citing the cases of *New Orleans Savings Bank*, 167 U. S. 371 396, 398 (*supra*) and *Southern Pa. R. Co. v. United States*, 168 U. S. 1, 52. See also syllabus in case of *Baker v. Cummings*, 181 U. S. 117.

It is true that there are certain exceptions to the application of the doctrine of *res adjudicata*, but the instant case is not one which may properly be placed among the exceptions.

In 23 Cyc. at the page cited to sustain the contention of the learned counsel, it is said:

"LIMITATION OF ESTOPPEL TO ESSENTIAL FACTS. *The estoppel of a judgment cannot be extended beyond the particular facts on which it was based; it determines only such points or questions as are sufficient to sustain the legal conclusion that judgment must be given for one or other of the parties in the particular form and amount in which it was rendered, not additional matters, unnecessary to the decision of the case, although they may come within the scope of the pleadings, unless they were actually litigated and passed upon.*

"NEW OR CHANGED FACTS. *The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.*" (23 Cyc. 1290-91).

Any by way of elaboration the author says on the next page.

"The fact that in the former suit additional property rights, or interests were involved does not affect the conclusiveness of the judgment as to that portion involved in the suit in which the estoppel is set up.

"The estoppel of a judgment extends only to the particular property or right in controversy, except where it determines the title or right under which the party claims, in which case it is decisive as to any other property or right claimed under the same title.

"The extent of an estoppel by judgment depends upon the principle of law applied to the facts of the case; it is not determined by the court rendering the judgment, which has no power to say how far its judgment shall or shall not be conclusive; and if the judgment itself does not show what matters were litigated and decided, the fact may be shown from other parts of the record or by competent evidence, although the estoppel cannot be extended to matters which the judgment expressly declares not to have been in issue in the action in which it was rendered or to have been omitted from consideration therein." (23 Cyc. pp. 1291-92).

And again at page 1295 it is said:

"The rule is often stated in general terms that a judgment is conclusive not only upon the question actually contested and determined, but upon all matters which have been

litigated and decided in that suit; and this is undoubtedly true of all matters properly belonging to the subject of the controversy and within the scope of the issue, so that each party must make the most of his case or defense, bringing forward all his facts, grounds, reasons or evidence in support of it, on pain of being barred from showing such omitted matters in a subsequent suit; and it is also true that, where the second suit is upon the same cause of action, all matters which might have been litigated are conclusively settled by the judgment; and that generally the estoppel applies where matters which should have been urged as a defense in the first suit are attempted to be made the basis of a second action; or, according to some authorities, where defenses which were available against an adverse claim in the first suit, but not then set up, are sought to be used in a second action, either by way of defense or as a foundation of a claim for relief."

And again the same author, at page 1346, says:

"A judgment in an action to enforce the collection of delinquent taxes is conclusive as to all matters actually litigated, and also as to all questions and objections which might have been raised against its rendition, including the fact of non-payment, the liability of the land to taxation, and the regularity of the assessment and subsequent proceedings."

Among other authorities relied upon by the learned counsel is the last sentence of section 938 of Cook on Corporations, (7th Ed.) Vol. 4, p. 4008, where it is said:

"An adjudication as to an assessment or tax for one year is not *res judicata* as to subsequent years, if the value has changed or the assessors have changed."

A number of authorities are cited, in Note 4, which, however, we feel justified in saying do not at all sustain the text, so far as to have a bearing upon the question here.

Among these is 27 Am. & Eng. Ency. L., p. 694 and 701. The first of these references, page 694, is in the following language:

"Assessors are not bound by the previous assessed value of real estate, whether it was made by assessing officers or by a court on appeal, and may legally disregard it and exercise their own judgment. Each assessment is a distinct proceeding separate from other assessments, and the doctrine of *res adjudicata* has no application."

And the second reference, found at page 701, is as follows:

"An assessment is not a judgment within the doctrine of *res adjudicata*, and does not bar or estop a supplemental assessment of property which was, in fact, erroneously omitted, even though its omission in the first instance was the result of a decision by the officers making the regular assessment, holding it to be exempt."

Before proceeding further to discuss the authorities cited, we wish to call attention to the fact that it is evident from the language used by Mr. Cook, that he intended to limit the doctrine stated by him to the assessment and taxation of physical properties and not to a license tax or pole rental tax, for the obvious reason that assessments of personal and real estate values may and do vary from year to year, whereas license taxes are not subject, in general, to variation, and are imposed by statute or ordinance without the intervention of assessors or other ministerial board, besides, as the record shows, as far back as the year 1913, when the decision of the Hustings Court was rendered, there has been no change in the rental charge per pole.

Another authority relied upon by Mr. Cook is *Bank v. Commonwealth*, 207 U. S. 258. There an injunction was sought to enjoin a State Board of Valuation and Assessment from assessing bank stock for taxation, upon the ground that said Board is the agent of the local municipalities and is therefore bound by a prior injunction decree against a county in a suit to which the Board was not a party. In this situation the court held that any county seeking to recover taxes was not concluded on any theory on the dependence of the power of the county upon the valuation and apportionment made by the Board, especially where the State courts had not adopted this theory of the relation of the Board to the counties of the State.

The question there involved by no manner of means affects the question here.

Another case cited and relied on by the learned author is *Covington v. First National Bank*, 198 U. S. 100, being an appeal from the Circuit Court of the United States for the Eastern District of Kentucky, to review a decree which enjoined the collection of certain taxes on the shares of the capital stock of a national bank, and refused to enjoin taxes of other years. In this case Mr. Justice Day, at page 108, uses the following language:

"It is sufficient to say that, if this case had been decided in the State court of Kentucky, the adjudication pleaded here-

in, not involving taxes for the same years as those now in controversy, would not avail as an estoppel between the parties. It is true that a different rule prevails in the courts of the United States. The reasons therefor were stated in an opinion by Mr. Justice White, speaking for the court, in the case of *New Orleans v. Citizens Bank*, 167 U. S. 371, and in cases arising in a Federal jurisdiction the doctrine therein announced will doubtless be adhered to."

Besides, it is so to be remembered that the learned counsel had not pointed out any difference either in the mode of assessment or in the amount of the tax assessed since the adjudication in 1913 made by the Hustings Court of the City of Richmond, which is relied upon as conclusive upon the question of the imposition of a rental charge upon the poles of the Company.

As to the imposition of the license tax it is true that no contention was made in the Hustings Court that the same was in any wise illegal, unlawful or unconstitutional, yet though this be true it falls under the doctrine of estoppel for the obvious reasons stated by Judge Goff in the case of *Western Union v. Richmond*, which, as hereinbefore shown, was affirmed by Mr. Justice Holmes in his opinion when that case was determined in the Supreme Court of the United States. The long acquiescence of the plaintiff in the payment of the license tax from the time when the Postal Company was granted the privilege of planting its poles along the streets of the City in the year 1889 to the year 1916, when the bill in this case was filed, covering a period of more than 28 years, estops the Company from now complaining of the same.

In the face of the statement by Mr. Justice Day, in *Covington v. First National Bank*, *supra*, and the holding in *New Orleans v. Citizens Bank*, *supra*, to which might be added the other case cited by Judge Cooley (*Baldwin v. Maryland*, 179 U. S. 220) it seems unnecessary to anticipate that this Honorable Court will now reverse the decision in these cases, and hold, as contended by the learned counsel, that the doctrine of *res adjudicata* cannot be applied in a suit for taxes for one year to a suit for taxes for another year.

Respectfully submitted,

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December 10, 1918.



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POSTAL TELEGRAPH CABLE COMPANY *v.* CITY
OF RICHMOND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 169. Argued January 22, 1919.—Decided March 17, 1919.

The City of Richmond is authorized by its charter and the statutes of Virginia to impose an occupation or license tax on the business of a telegraph company done within the city. P. 257.

Under its police power, a State may impose a license tax upon a telegraph company, which has accepted the Act of Congress of July 24, 1866, and is doing both an interstate and a local business, provided the tax is restricted in terms to the local business and does not in effect burden or discriminate against the interstate business. *Id.*

Where a State requires a telegraph company to engage in intrastate business, and taxes that business more than the amount of the net receipts therefrom, so that payment, if compelled, must come in part from receipts from interstate business, *semble*, that the tax must

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Argument for Appellant.

be declared invalid; but only if the incidence on interstate commerce is shown by clear and convincing evidence. P. 258.

A telegraph company although it has accepted the Act of 1866, and is engaged in interstate commerce, may be charged by a city a reasonable amount upon each pole maintained and used in the city streets, both as compensation for such use, in the nature of rental, and to cover the expense entailed on the city by the presence of the poles and wires and the liabilities and duties arising therefrom. *Id.* Such a tax, if reasonable in amount, is not necessarily objectionable because it exceeds the net returns from local business and must be paid from interstate earnings. P. 259.

Affirmed.

THE case is stated in the opinion.

Mr. John N. Sebrell, Jr., for appellant:

The license tax while, in terms, restricted to business done within the State, is, in fact, a tax upon the company's interstate business. This becomes so because the *intrastate* business at Richmond is so small, that the net receipts therefrom are insufficient to pay the tax, and the payment if compelled, must come from the other business of the company, namely, its interstate business, since the laws of Virginia require it to accept such intrastate business. This fact was established by the allegations and proofs and stood unchallenged. In the case of the telegraph business (unlike the railroad business, where conditions as to different classes of freight and service are so diverse,) the most equitable method of determining the proper proportion of the expenses incurred in and properly chargeable to intrastate business and interstate business, is to divide the expense according to the ratio which exists between the interstate and intrastate receipts. Distinguishing *Wood v. Vandalia R. R. Co.*, 231 U. S. 1, and *Simpson v. Shepard*, 230 U. S. 352.

As to the license tax, therefore, the case falls clearly within *Pullman Company v. Adams*, 189 U. S. 420, since there is no doubt that the company was required to do

local business by the laws of Virginia. *Umstadter v. Postal Telegraph-Cable Co.*, 103 Virginia, 742; *Western Union Telegraph Co. v. Reynolds*, 100 Virginia, 459. See also, *Postal Telegraph-Cable Co. v. Cordele*, 141 Georgia, 658; *Postal Telegraph-Cable Co. v. Norfolk*, 118 Virginia, 455; *Postal Telegraph-Cable Co. v. Charleston*, 153 U. S. 692; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, *Lyng v. Michigan*, 135 U. S. 161, 166; *Norfolk &c., R. R. Co. v. Pennsylvania*, 136 U. S. 114, 118; *Leloup v. Mobile*, 127 U. S. 641.

The tax on poles also is unjust, excessive, unreasonable and void—far in excess of any expense to which the city is put for inspection and superintendence.

This court has held in a line of decisions that, where a municipality has no ownership in the streets which authorizes a rental, the only power for license fee exactions upon the instrumentalities of interstate commerce is derived from the police power. *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64; *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160.

The City of Richmond has no property right of any kind in the streets, the easement of passage therein being in the State and the fee in the abutting owners. Code of Virginia, 1887, § 1038, 1287; *Essex v. New England Telegraph Co.*, 239 U. S. 313; *Richmond v. Smith*, 101 Virginia, 161.

It results, therefore, that the city, being without property rights in the streets, can impose only such tax as is authorized by its police power, and, therefore, this case falls under the influence of *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, and not under *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92.

It appears from the record that there is no special inspection or supervision of the poles except by the regularly employed officers of the city with little or no ad-

ditional expense, and that the license fees exacted from the company are greatly in excess of any amount necessary for police inspection or supervision. In fact, this does not seem to be seriously controverted in the case.

That such taxes are invalid, see Dillon, *Municipal Corporations*, 5th ed., vol. 11, pp. 599, 665; *Kitanning Borough v. American Natural Gas Co.*, 239 Pa. St. 210; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 164, 167; *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, 72; *Philadelphia v. Western Union Telegraph Co.*, 40 Fed. Rep. 615; *Sunset Telephone Co. v. Medford*, 115 Fed. Rep. 202; *Saginaw v. Swift*, 113 Michigan, 660; *Atlantic Postal v. Savannah*, 133 Georgia, 66, 71; *Foote & Co. v. Maryland*, 232 U. S. 494.

The right to use the streets for the erection of poles was granted directly by the State by § 1287 of the Code, supplemented by the ordinance of the city, and the grants there made when accepted and performed by the company constituted a contract, the obligation of which was impaired by the pole-tax ordinance. *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58; *Boise Water Co. v. Boise City*, 230 U. S. 84; *Louisville v. Cumberland Telephone Co.*, 224 U. S. 663. The power reserved "to put other and additional restrictions and regulations upon the erection or use of said poles and wires by said company, and to require at any time by ordinance or resolution, that the use or erection of said poles and wires shall cease," is no more than a reservation of the police control of the streets, *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 60, 72; and could not affect the nature of the grant coming direct from the State. *Grand Trunk Western Ry. Co. v. South Bend*, 227 U. S. 544.

Counsel also discussed certain questions of *stare decisis*, acquiescence and *res judicata*.

Mr. H. R. Pollard for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, the Telegraph Company, in its bill filed in the District Court of the United States for the Eastern District of Virginia, sought to enjoin the City of Richmond and its officers from collecting an annual license tax of \$300 imposed upon the company by ordinance "for the privilege of doing business within the City of Richmond, but not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents," and also from attempting to collect an annual fee of \$2, imposed by another ordinance, for each telegraph pole which the company maintained or used in the streets of the city.

The allegations of the voluminous bill essential to be considered are: That the company accepted the Act of Congress of July 24, 1866, entitled, "An Act to aid in the Construction of Telegraph Lines," etc., [c. 230, 14 Stat. 221], and is engaged in transmitting messages by telegraph, intrastate and interstate,—this is admitted; and the following which are denied, viz., that the cost of doing the intrastate business transacted by the company at Richmond is greater than the receipts from it and that since both taxes must be paid, if at all, from receipts from interstate commerce they constitute such a burden upon that commerce of the company as to render them unconstitutional and void.

The evidence introduced on the trial was largely in the form of affidavits, together with a transcript of the evidence taken in a former case, which was stipulated into the record.

The District Court held the taxes valid and dismissed the bill. On the constitutional questions involved a direct appeal brings the case into this court for review.

Except for the contention that this record shows affirmatively and clearly that the taxes complained of are necessarily unreasonable and a burden upon interstate commerce, the case could well be disposed of, without discussion, on the authority of decided cases.

That the City of Richmond has authority, under the statutes of Virginia and its charter, to impose an occupation or license tax on the business of the telegraph company done within the city is clear enough. Virginia Code, § 1042; Charter of the City of Richmond, § 67; *Postal Telegraph-Cable Co. v. Norfolk*, 101 Virginia, 125; *Postal Telegraph-Cable Co. v. Norfolk*, 118 Virginia, 455. Assuming the existence of this power in the city, since interstate and government service are expressly excluded from liability for the license charge, the following cases sustain the validity of the tax. *Postal Telegraph-Cable Co. v. Charleston*, 153 U. S. 692; *Emert v. Missouri*, 156 U. S. 296; *Kehrer v. Stewart*, 197 U. S. 60; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160; *Williams v. Talladega*, 226 U. S. 404, 416.

The principle of these cases, and of many others cited in the opinions, is that, as against federal constitutional limitations of power, a State may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against, interstate business and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. Such a tax is not, as is argued, an inspection measure, limited in amount to the cost of issuing the license or supervising the business, but is an exercise of the police power of the State for revenue purposes, restricted to internal commerce, and therefore within the taxing power of the State. *Postal Telegraph-Cable Co. v. Charleston*; *Williams v. Talladega*, *supra*; and

Western Union Telegraph Co. v. Alabama State Board of Assessment, 132 U. S. 472, 473.

A statute of Virginia requires all telegraph companies doing business in the State to transmit all messages, state or interstate, which are tendered by other companies or by individuals, upon payment of the usual charges. This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax, results, it is argued, in imposing a burden upon its interstate business for the reason that the net receipts from its intrastate business are insufficient to pay the tax and therefore payment, if compelled, must be made from interstate receipts. If the facts were as thus asserted it well might be that this tax would be invalid, *Pullman Co. v. Adams*, 189 U. S. 420; *Williams v. Talladega*, 226 U. S. 404, 416, 417; but a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void.

There remains to be considered the fee, as it is called in the ordinance imposing it, of \$2 for each pole maintained or used in the streets of the City of Richmond. This character of tax has also been the subject of definite decision by this court and has been sustained where not clearly shown to be a direct burden upon interstate commerce or unreasonable in amount, having regard to the purpose for which it may lawfully be imposed. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419; *Postal Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160. These decisions do not conflict with *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55, or *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64. In the former of these

cases the decision of this court rests upon its conclusion that the jury found the tax unreasonable in amount, and in the latter the ordinance involved was disposed of on exception to the affidavit of defense, admitting the allegations of the bill that no inspection of the poles or wires or supervision of the business of the company had been, or was intended to be, made by the Borough and that if made the cost could not reasonably be one-twentieth of the tax imposed. This showing, taken with other facts in the case, it was held, rendered the charge unreasonable and void.

The decisions cited sustaining this character of tax proceed upon the principle that, although the occupation of its streets by a telegraph company engaged in interstate commerce, which has accepted the Act of Congress of 1866, cannot be denied by a city, yet, since the use of its streets for its poles by such a company is necessarily, in a measure, permanent and exclusive in character, and different in kind and extent from that of the general public, and since such use imposes contingent liabilities upon a city, it is competent for it, in the exercise of its police power, to exact reasonable compensation "in the nature of rental" for the use of its streets, having regard to the duties and responsibilities which such use imposes on the municipality. Even if the net returns from the intrastate business should not equal such tax and it must be paid from interstate earnings, this alone would not be conclusive against its validity. If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business must pay its way,—in this case for its right of way and the expense to others incident to the use of it. *St. Louis v. Western Union Telegraph Co.*, 148 U. S., *supra*, pp. 98, *et seq.*; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465. Such compensation should

also include the expense of inspection of the poles and wires used, and of such supervision of the business of the company conducted in the streets, as may be reasonably necessary to secure the safety of life and property of the inhabitants and of the users of the streets; but with the authority in the courts, on proper application, to determine whether, under the conditions prevailing in a given case, the charge made is reasonably proportionate to the service to be rendered and the liabilities involved, or whether it is a disguised attempt to impose a burden on interstate commerce. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465; *Postal Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163; *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 566; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 169.

These decisions and principles dispose of the "pole tax" before us.

The total amount of this tax was, in 1911, \$344, in 1914, \$384, and in 1915, owing to the extension of the city limits, it became \$666. There is evidence which must be credited, that poles and wires in the streets of a city require official inspection and supervision to secure their being kept in proper position and repair, so that they will not interfere with street traffic and may not, especially in time of storm, become crossed with wires carrying high tension currents and thus cause fires and loss of life and property. There is conflict in the evidence as to the cost to the city of such inspection and regulation, but the amount stated does not seem excessive for the service which should be rendered, and which witnesses for the city testified was rendered, in looking after the many poles of the appellant, part of which, at least, carried many wires. As great or greater charges were sustained in *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *Postal*

Telegraph-Cable Co. v. Baltimore, 156 U. S. 210; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 172.

The contention cannot be allowed that the ordinance is shown to be void by a formula, devised by an officer of the appellant and pressed upon our attention, for determining the division of costs and expenses between interstate and intrastate business, which it is claimed shows that the pole tax must be paid wholly from receipts from interstate business.

Regardless of obvious criticisms which might be advanced to this formula and to the inadequacy of the data furnished by the record for testing its validity, the charge imposed upon the company, as we have seen, was so moderate in amount, having regard to the necessary burdens which the poles and wires in the streets must impose upon the city, and is so well within the prior holdings of this court, which we have cited, that it cannot be accepted as a sufficient basis for declaring the ordinance invalid.

There is no disposition on the part of this court to modify in the least the law as it has been stated in many cases, that "neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void." *Crutcher v. Kentucky*, 141 U. S. 47, 62; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. But municipal ordinances, which for constitutional inquiry are deemed state laws, will be declared void only where clearly shown to be unconstitutional and this very certainly cannot be said of the ordinances in this case, assailed as they are, upon inadequate evidence and upon purely empirical calculations which we are asked to adopt.

It results that the decree of the District Court must be
Affirmed.